No. 91-1523-CFX

Title: Florence County School District Four, et al., Petitioners
v.
Shannon Carter, a minor by and through her father, and next friend, Emory D. Carter

Docketed: March 23, 1992

Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Feb 10 1992	Application (A91-580) to extend the time to file a petition for a writ of certiorari from February 24, 1992 to April 9, 1992, submitted to The Chief Justice.
	Feb 11 1992	Application (A91-580) granted by the Chief Justice extending the time to file until March 24, 1992.
	Mar 23 1992	Petition for writ of certiorari filed.
	Apr 22 1992	Brief amicus curiae of petitioner National School Boards Association filed.
	Apr 29 1992	DISTRIBUTED. May 15, 1992
	Apr 29 1992	Brief of respondent Shannon Carter in opposition filed.
	Apr 29 1992	Brief amici curiae of Louisiana, et al. filed.
	Apr 29 1992	Motion of National Association of State Boards of Education for leave to file a brief as amicus curiae filed.
	May 6 1992	Reply brief of petitioners filed.
	May 18 1992	Motion of National Association of State Boards of Education for leave to file a brief as amicus curiae GRANTED.
	May 18 1992	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	Jan 8 1993	Brief amicus curiae of United States filed.
	Jan 13 1993	REDISTRIBUTED. February 19, 1993
	Feb 22 1993	Petition GRANTED. limited to Question 1 presented by the petition.
		**********
	Mar 11 1993	Order extending time to file brief of petitioner on the merits until April 29, 1993.
	Apr 29 1993	Brief amici curiae of Arizona, et al. filed.
	Apr 29 1993	Brief of petitioners Florence County School District Four, et al. filed.
	Apr 29 1993	Joint appendix filed.
	Apr 29 1993	Brief amici curiae of National School Boards Association, et al. filed.
	Apr 29 1993	Brief amici curiae of National League of Cities, et al. filed.
	May 13 1993	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	May 24 1993	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	May 28 1993	Record filed.
	Jun 1 1993	Order extending time to file brief of respondent on the merits until June 18, 1993.

No. 91-1523-CFX

Entry	Date	Proceedings and Orders
	Jun 8 1993	Record filed.
	Jun 11 1993	Brief amicus curiae of Learning Disability Association of America filed.
	Jun 15 1993	Brief amicus curiae of National Head Injury Foundation, Inc. filed.
	Jun 18 1993	Brief of respondents Shannon Carter, et al. filed.
	Jun 18 1993	Brief amicus curiae of United States filed.
	Jun 18 1993	Brief amici curiae of National Alliance For The Mentally Ill, et al. filed.
	Jul 16 1993	Reply brief of petitioners filed.
	Aug 6 1993	CIRCULATED.
	Aug 16 1993	SET FOR ARGUMENT WEDNESDAY OCTOBER 6, 1993. (1ST CASE).
	Oct 6 1993	ARGUED.

91-1523

Supreme Court, U.S.
FILED
MAR 23 1992
OFFICE OF THE CLERK

No. 91-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

---

Of Counsel
BRUCE E. DAVIS
1704 Fair Street
Camden, S.C. 29020
(803) 432-2880

DONALD B. AYER
(Counsel of Record)
BETH HEIFETZ
DAVID A. YALOF
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a learning disabled child's parents are entitled to state reimbursement under the Individuals with Disabilities Education Act (IDEA), when they unilaterally place her in a private school that does not meet state educational standards or in other respects satisfy the criteria of a "free appropriate public education," which the state is required under 20 U.S.C. §§ 1401(a)(18) and 1412(1) to provide as a condition of receiving federal funding under the Act.

2. Whether a federal court may set aside an "Individualized Education Program" promulgated in accordance with the procedures called for in the IDEA, and affirmed on review by the state educational agencies, on the basis of achievement goals contained in the plan, notwithstanding substantial evidence that the child received educational benefits under the plan.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were the petitioners Florence County [South Carolina] School District Four, the School District's Superintendent Ernest K. Nicholson, in his official capacity, and school board members Bennie Anderson, Monroe Friday, Jack Odom, Elrita Bacote, T.R. Green, and James W. Hicks, in their official capacity.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE WRIT 12

I. THE DECISION BELOW CREATES A DIRECT CONFLICT OVER WHETHER PARENTS OF A DISABLED STUDENT MAY BE ENTITLED TO REIMBURSEMENT UNDER THE ACT WHERE THEY UNILATERALLY TRANSFER THEIR CHILD FROM A PUBLIC SCHOOL TO A PRIVATE SCHOOL WHICH IS NOT IN COMPLIANCE WITH STATE EDUCATIONAL STANDARDS AND OTHERWISE FAILS TO MEET THE STATUTORY DEFINITION OF A FREE APPROPRIATE PUBLIC EDUCATION ... 13

TABLE OF CONTENTS (cont')

Page

II. THE FOURTH CIRCUIT ACTED BEYOND ITS AUTHORITY UNDER THE ACT IN REJECTING AN INDIVIDUALIZED EDUCATION PROGRAM ("IEP") ON THE BASIS THAT THE GOALS STATED IN THE IEP WERE INSUFFICIENTLY AMBITIOUS, WHERE THE STATE AGENCY ACTED IN FULL COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF THE ACT, THE CHILD IN FACT RECEIVED SUBSTANTIAL EDUCATIONAL BENEFITS UNDER THE PROGRAM, AND THE GOALS STATED IN THE IEP WERE DELIBERATELY MADE MODEST AT THE REQUEST OF THE PARENTS' REPRESENTATIVE 22

CONCLUSION 25

APPENDIX 1a

STATUTORY AND REGULATORY APPENDIX 56a

TABLE OF AUTHORITIES

Page

CASES

Carter v. Florence County School District Four, 950 F.2d 156 (4th Cir. 1991) 2
Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986) 17
Barnett v. Fairfax County Sch. Bd., 927 F.2d 146 (4th Cir.), *cert. denied*, 112 S.Ct. 175 (1991) 23
Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982) ..... *passim*
Burlington Sch. Comm. v. Massachusetts Bd. of Educ., 471 U.S. 359 (1985) 3,10,14,19
Cain v. Yukon Public Schs., Dist I-27, 775 F.2d 15 (10th Cir. 1985) 23
Carrington v. Commissioner of Educ., 404 Mass. 290, 535 N.E.2d 212 (1989) 17
Epperson v. Arkansas, 393 U.S. 97 (1968) 13
Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) 13
Knight v. District of Columbia, 877 F.2d 1025 (D.C.Cir. 1989) 23
Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577 (D.C. Cir. 1984) 21
Rettig v. Kent City Sch. Dist., 788 F.2d 328 (6th Cir.), *cert. denied*, 478 U.S. 1005 (1986) 23

TABLE OF AUTHORITIES (cont'd)

Page

CASES

Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 1122 (1991) 23
Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563 (2d Cir. 1989) ... 11,17,20
Wilson v. Marana Unified Sch. Dist., 735 F.2d 1178 (9th Cir. 1984) 23
Wood v. Strickland, 420 U.S. 308 (1975) 13

STATUTES

Individuals with Disabilities Act, 20 U.S.C.A. §§ 1400-1485 (West 1988 & Supp. 1991) 2,3

20 U.S.C. § 1401(a) ..... *passim*
20 U.S.C. § 1412 3,10,13,14,18
20 U.S.C. § 1413(a) 11,16,17,18
20 U.S.C. § 1414(a)(5) 4,16
20 U.S.C. § 1415 4,14

RULES & REGULATIONS

Office of Special Education and Rehabilitation Services Rules, 34 C.F.R. §§ 300.1-300.754(1991) 2

TABLE OF AUTHORITIES (cont'd)

Page

34 C.F.R. § 300.347(c) 14,19
34 C.F.R. § 300.349 24
34 C.F.R. § 300.403 19

S.C. Code Regs. 43-62(k) 15
S.C. Code Regs. 43-243(E)(7) 15
S.C. Dept. of Educ., Defined Maximum Program for South Carolina School Districts (1986) 15

MISCELLANEOUS

Philip D. Block, *Tough Action needed on school budget*, Chicago Tribune, May 3, 1991, at 22 21

S.C. Dept. of Educ., Ranking of the Counties and School Districts of South Carolina, 1989-90 (1991) 21

U.S. Dept. of Educ., Justification of Appropriation Estimates to the Congress Fiscal Year 1993 (1992) 3

29 Gov't Empl. Rel. Repl. (BNA) at 385 (April 1, 1991) 20

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-____

Florence County School District Four,
Ernest K. Nicholson, Superintendent,
in his official capacity, and School Board
Members Bennie Anderson, Monroe Friday,
Jack Odom, Elrita Bacote, T.R. Green,
James W. Hicks, in their official capacity,

Petitioners,

v.

Shannon Carter, by and through her
father and next friend, Emory Carter,

Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

The Florence County, South Carolina, School District Four petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 950 F.2d 156 (4th Cir. 1991). It is reprinted at pages 1a-19a of the appendix to this petition. The order and decision of the district court are unreported and are reprinted at pages 20a-39a of the appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1991. On February 11, 1992, Chief Justice Rehnquist entered an order extending the time in which to file a petition for writ of certiorari to and including March 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant sections of the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400-1485 (West 1988 & Supp. 1991), its accompanying regulations, 34 C.F.R. §§ 300.1-300.754 (1991); and certain provisions of South Carolina law, are set forth in the Appendix. App. 56a-72a.

STATEMENT

The decision below concerns the nature and extent of a state's obligation under the IDEA to provide a free appropriate public education, which has been addressed in this Court's decisions in *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982)

and *Burlington Sch. Comm. v. Massachusetts Bd. of Educ.*, 471 U.S. 359 (1985).

2 1. *The Statutory Scheme*: The Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400-1485 (West 1990 & Supp. 1991) ("IDEA" or "Act"), formerly titled the Education of the Handicapped Act, imposes both substantive and procedural obligations on states as a condition of federal funding to aid in educating children with disabilities.[1] Substantively, states receiving federal funds are required to provide such children with a "free appropriate public education," 20 U.S.C. § 1412(1), which must, under the statute, be provided at public expense and under public supervision and direction, meet the standards of the state educational agency, and be provided in conformity with an "individualized education program" ("IEP") allowing it to be tailored to the needs of the child. 20 U.S.C. § 1401(a)(18). The IEP is prepared at a meeting between a qualified representative of the local education agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child. 20 U.S.C. § 1401(a)(20).

By statute, the IEP consists of a statement of (1) the child's "present levels of educational performance";

---

[1]The federal assistance provided under the Act varies from state to state and from year to year, but in no event makes up more than a small fraction of the cost of providing the special education services required under the statute. In 1991, the federal government contributed an average of $407 per disabled child, which represents approximately 7% of the additional cost of educating a disabled child, over and above the average cost of educating a non-disabled child. U.S. Dept. of Education, Justification of Appropriation Estimates to the Congress Fiscal Year 1993 at F-19 (1992).

(2) "annual goals, including short-term instructional objectives"; (3) "specific educational services to be provided"; (4) a "date for initiation and anticipated duration" of services; (5) "needed transition services for students . . . including, when appropriate, a statement of the interagency responsibilities . . ."; and (6) "objective criteria and evaluation procedures" for determining whether the objectives are being met. 20 U.S.C. § 1401(a)(20). Under the Act, the IEP must be reexamined and reevaluated prior to the start of each school year. 20 U.S.C. § 1414(a)(5).

Procedurally, the IDEA requires the state to provide "an opportunity to present complaints with respect to any matter relating to . . . the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1)(E). Upon receipt of a complaint, the local education agency must provide parents with a hearing before an impartial arbiter. 20 U.S.C. § 1415(b)(2). Review of this local agency decision is available before the state education agency. 20 U.S.C. § 1415(c). The state agency's decision, in turn, is reviewable in federal district court, 20 U.S.C. § 1415(e)(2), through a two-part inquiry looking, first, at whether the state complied with the procedures set forth in the Act, and, second, at whether "the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits[.]" *Rowley*, 458 U.S. at 206-07.

2. *Facts*: Petitioner Shannon Carter began first grade at the local public school in Florence County [South Carolina] School District Four in Fall of 1975.

App. 23a (JA 47).[2] For second grade, Shannon's parents withdrew her from the public school and enrolled her in a private school (Roy Hudgens Academy) in a neighboring county, so that she could, as her mother stated, "be with the children that she was with in our community, at church." (JA 48) Shannon completed her elementary education at the private school. App. 23a. In the fall of 1982, her parents re-enrolled her in the Florence County public school to begin the seventh grade. *Id.* at 24a.

At the request of Mrs. Carter, in early 1983, the junior high school guidance counselor tested Shannon's I.Q. and achievement levels. In February 1983, the guidance counselor requested that the school district's educational evaluator conduct similar tests, and he administered one intelligence and one achievement test to Shannon in February 1983. The test scores indicated that Shannon was slightly below average in achievement, but reflected no learning disability. App. 24a (JA 49).

In March 1985, upon discovering that Shannon had altered her report card to reflect better grades than she was actually receiving, Shannon's mother contacted the school district about her concerns. (JA 100-101). She informed the District that she was considering placing Shannon in a private school (JA 101), and it was agreed that a further evaluation of Shannon would be conducted. Those tests, conducted on April 13, 1985, suggested that Shannon had a serious learning disability. App. 25a.

---

[2] "JA" refers to the joint appendix filed with the court of appeals. Copies of that joint appendix have been lodged with the Clerk for the Court's convenience.

During this time period -- before any IEP was formulated -- Shannon's parents made clear in a number of ways that they preferred not to have their daughter attending the public school, that they were skeptical of the District's ability to provide special education services, and that part of their concern related to the racial make-up of the school.[3] The record includes a statement by the psychiatric social worker hired by the Carters to assist in dealing with Shannon's situation, to the effect that Shannon's "parents did not want Shannon to go to the predominantly black school in Timmonsville." (JA 39, 360). Nonetheless, at meetings during the latter part of April 1985, District officials gave Mrs. Carter the results of the evaluation, described to her various educational programs that would be helpful to Shannon, and explained and provided her with a written description of the process for determining the proper program, and the procedural rights under the IDEA attendant to that process. (JA 106, 109, 143).

---

[3]Ms. Nelson, a district official, recounted statements by Mr. Carter on April 13, 1985, to the effect that he knew that the District could not provide an appropriate program for Shannon, and that "our teachers could not read or speak English, much less teach it." (JA 105). Ms. Summer, the psychiatric social worker hired by the Carters also informed Ms. Nelson that "the Carters were not interested in special education services . . . from [District 4]." (JA 109).

Further, Ms. Nelson stated that Mrs. Carter offered as reasons not to allow Shannon to try out for cheerleader that "Shannon would have to ride the bus with those students," and "[y]ou know yourself that the students at this school are nothing but scum." (JA 104). Mrs. Carter denied that she ever stated that she did not want Shannon associating with other students (JA 141), or (in testimony omitted from the joint appendix in the court below) that she had ever used the word "scum." (JA 142).

A meeting was held on May 1, 1985, to formulate the specifics of an IEP for Shannon. The school district proposed that Shannon remain in regular classes to a substantial degree, consistent with the IDEA's "mainstreaming" requirement, 20 U.S.C. § 1412(5)(B), and spend at least one period per day five days per week in the resource room where she would receive intensive help along with two to four other students. (JA 121, 123). Shannon's parents objected to the proposed "resource room" placement. Instead, they requested an "itinerant program" in which Shannon would work one-on-one with a particular teacher whom the parents specified, notwithstanding that it would involve fewer hours of special instruction per week than would be possible under the "resource room" placement.[4] App. 26a n.7. The school district ultimately approved the itinerant placement.

In addition, the social worker hired by Shannon's parents encouraged the District to minimize pressure on Shannon and to set goals in such a way as to minimize Shannon's risk of failure. (JA 278, 282-286). After some discussion, the IEP was signed by both Shannon's parents and representatives of the District, incorporating the itinerant proposal and setting goals of four months' progress in reading and four months' progress in math during the school year, goals which would be viewed as the minimum gains to be achieved. App. 27a (JA 282, 284, 365-377). It became effective May 2, 1985, and

---

[4]Under the itinerant approach, Shannon received individualized attention from a special education teacher three days per week, and counseling with the librarian one period each of the other two days of the week. (JA 122).

stated immediately below the signature lines that "Parents and school personnel may request another IEP meeting at any time they feel that a change is needed in the student's IEP." (JA 366). Shannon's grades improved substantially in the grading period immediately following implementation of the IEP, and were sufficient at the end of the spring term to allow her to pass the ninth grade. (JA 149, 263, 269, 271, 292-293).

Despite the significant improvement in Shannon's grades, her parents disputed the appropriateness of the educational program and requested a hearing. App. 5a. During that same period, Shannon also applied for admission to Trident Academy, a private school for learning disabled children. (JA 169-70). On August 8, 1985, Shannon was accepted for admission to Trident, where she enrolled in the fall of 1985 and for the next three years, graduating in the Spring of 1988. During the time that Shannon was there, Trident did not utilize the IEP procedure, and employed a number of teachers who were not certified in accordance with South Carolina state law. App. 11a-12a (JA 195-96, 200-201).

At a due process hearing conducted on August 20, 1985, the local education agency hearing officer rejected the challenge of Shannon's parents to the District's placement of her. App. 44a-55a. On appeal of that decision to the state education agency, on October 14, 1985 the state hearing officer affirmed the decision, holding that "the concept of least restrictive environment is violated in the extreme by removing this child from her natural family so that she might attend an institution alleged to have a better program than the public school setting." *Id.* at 42a.

3. *Judicial Proceedings*: In July 1986, over eight months after the hearing officer issued his decision and after Shannon had completed the tenth grade at Trident Academy, her parents filed suit on her behalf in the United States District Court for the District of South Carolina. The complaint alleged that the school district had failed to offer Shannon a "free appropriate public education" within the meaning of the Act, and had failed to comply with the Act's procedural requirements. Shannon's parents sought actual damages and retroactive reimbursement for tuition and other costs so far incurred.

The district court, following an evidentiary hearing, concluded in an unpublished opinion that the school district had not breached the procedural requirements of the Act, but ruled that the school district had failed to provide Shannon with a free appropriate public education under the Act. App. 22a-39a. The court held that the IEP was inadequate, looking principally to the limited goal of four months' progress in mathematics and reading which it set, and commenting that "Shannon was in need of an intensive self-contained L.D. environment to afford her with an individualized special education to meet her unique needs." *Id.* at 27a.

The court ruled, further, that the education offered at Trident had been appropriate for Shannon, and that the expenses incurred in sending her there -- which totalled more than $35,000 over a three year period for tuition and fees, room and board, mileage to school and four trips home per year -- were reasonable. The court noted that "the defendant has offered no evidence that Shannon could have received the special educational services provided by Trident at any facility closer to her home or at a lower cost." App. 30a (footnote omitted).

Accordingly, it ordered the school district to provide reimbursement for these costs. *Id.* at 39a.

On appeal, the Court of Appeals for the Fourth Circuit first addressed the School District's assertion that the IEP did, in fact, provide for an "appropriate education." Acknowledging the test set forth in *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982), stating that a free appropriate education is one that is "reasonably calculated to enable the child to receive educational benefits," the Fourth Circuit held that the School District's program was inappropriate because "a goal of four months' progress over a period of more than one year was rather modest for a student such as Shannon and was unlikely to permit her to progress from grade-to-grade with passing marks." App. 8a. The court dismissed the statutory requirement that disabled students be kept in classes with non-disabled children to the maximum extent appropriate, 20 U.S.C. § 1412(5), as assuming only "a subordinate role" in the formulation of an educational program. *Id.* at 8a-9a.

Turning to reimbursement, the court looked to this Court's decision in *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359 (1985), which allowed parents to receive reimbursement from the school district where they placed their child in a private school in the face of an inappropriate placement offered by the public school. App. 10a-11a. The court noted that, unlike this case, in *Burlington* the state's department of education had approved the parents' private school placement. It noted further the District's contention that no such state approval was or could have been given in this case, based on the facts that Trident does not comply

either with the terms of the IDEA, or with the teacher certification requirements applicable to public school teachers. App. 11a-12a.[5]

The court found these facts not to be "fatal to the request for reimbursement," however. App. 12a. It recognized the existence of a conflict in the circuits on the issue of whether reimbursement should be allowed under the Act in the absence of state approval of a private school chosen by the parents. App. 15a. Rejecting the position taken by the Second Circuit in *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563 (2d Cir. 1989), the court construed the language of 20 U.S.C. § 1413(a)(4)(B) to require that private schools meet state and Act "educational standards" only when the child is placed in the private school by the state or local school authorities, noting that it has no relevance where the parents place the child unilaterally. *Id.* at 13a. The court concluded that permitting reimbursement only as to state-approved private schools "would undermine the values and policies [of] the Act." The court also found it "hardly . . . consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." *Id.* at 17a-18a.

---

[5]The court noted that, at the time of trial, at least two faculty members at Trident, including one of Shannon's teachers, were not certified by the State of South Carolina. App. 11a.

REASONS FOR GRANTING THE WRIT

This case presents a question not addressed in *Burlington*, on which there is now a direct conflict in the circuits: Whether parents unilaterally electing to send their child to a private school in the face of an allegedly inappropriate placement offered by the public school authorities, may collect governmental reimbursement even though their private school placement does not satisfy the IDEA's requirements for a "free appropriate public education." By answering this question in the affirmative, the Court of Appeals for the Fourth Circuit allowed parents to receive reimbursement with public funds for their child's private education, notwithstanding that the education they select meets neither the state's educational standards nor the IEP requirements set forth in the Act. The court thus expanded the duty of public funding for private education beyond that required in the statute, to encompass various private school placements preferred by parents but not coming within the duty imposed on states by the statute.

Further, the Fourth Circuit held inappropriate an IEP that was formulated in full compliance with the procedural requirements of the Act and that clearly allowed the child to receive educational benefits, thus meeting the standard for court review of IEPs articulated by this Court in *Rowley*. By reaching this conclusion because the IEP's stated goals were "rather modest" -- where the parent's representative had specifically requested that the goals be set low in order to enhance the child's likelihood of success -- the court intruded into the policymaking domain of the state education agencies, contrary to the interpretation of the Act by this Court and by the other courts of appeals.

In both respects, the decision of the court below violates the principle stated by this Court in a variety of contexts, that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Wood v. Strickland*, 420 U.S. 308, 326 (1975)(overruled on other grounds); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

I. THE DECISION BELOW CREATES A DIRECT CONFLICT OVER WHETHER PARENTS OF A DISABLED STUDENT MAY BE ENTITLED TO REIMBURSEMENT UNDER THE ACT WHERE THEY UNILATERALLY TRANSFER THEIR CHILD FROM A PUBLIC SCHOOL TO A PRIVATE SCHOOL WHICH IS NOT IN COMPLIANCE WITH STATE EDUCATIONAL STANDARDS AND OTHERWISE FAILS TO MEET THE STATUTORY DEFINITION OF A FREE APPROPRIATE PUBLIC EDUCATION

In order to qualify for federal assistance under the IDEA, a state must demonstrate that it "has in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(1). The statute further defines the required "free appropriate public education" as "special education and related services that:

> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,

• • •

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

20 U.S.C. § 1401(a)(18). The state is to fulfill this obligation, where possible, by providing necessary services to the disabled student within the public school setting, with the child participating as much as possible in the same activities as non-disabled children. 20 U.S.C. § 1412(5). Where the public schools themselves are unable to provide the necessary services, the Act also provides for placement in an appropriate private school at governmental expense. *Burlington*, 471 U.S. at 369. Even where a private school or facility implements a child's individualized education program, responsibility for compliance with the statute remains with the public agency. 34 C.F.R. § 300.347(c).

In *Burlington*, this Court held that under the authority conferred on courts by the IDEA to "grant such relief as the court determines is appropriate," 20 U.S.C. § 1415(e)(2), parents who disagree with the placement offered by the school district may be allowed to recover reimbursement for the cost of unilaterally placing their child in a private school, provided that the "court determines that a private placement desired by the parents was proper under the Act and that the IEP calling for placement in a public school was inappropriate." 471 U.S. at 370. The question presented here is whether that right of reimbursement extends to parents' unilateral placements in private schools which fail to meet the statutory definition of a "free appropriate public education."

The court of appeals in this case ordered reimbursement of annual tuition and other costs totalling more than three times the District's average expenditures for children in public schools, notwithstanding that the education thus being funded concededly did not meet the standard of a "free appropriate public education" which the state is obligated to provide under the Act. The court noted specifically the fact that Trident was not and could not be approved for placement by the state educational agency because it employed faculty members -- including one of Shannon's teachers -- who were not certified by the state and could not teach in public schools. App. 11a-12a.[6] The Trident placement thus failed to meet the requirement of section 1401(a)(18)(B) that the services provided must meet the standards of the state educational agency. The court also noted that Trident "does not attempt to comply with the terms of the Act," although it does engage in periodic goal setting. App. 11a. In this respect, the placement at Trident failed to meet the requirement of 20 U.S.C. § 1401(a)(18)(D) that the services be provided in conformity with the

---

[6]According to South Carolina's State Board of Education regulations, private schools in which handicapped children have been duly placed must be in conformity with the Defined Minimum Program for South Carolina School Districts ("DMP"). S.C. Code Regs. 43-243(E)(7). The DMP expressly requires that a teacher of handicapped children for grades 9-12 be "certified or hold a permit in the area of handicapping condition in which the majority of the pupils are served." S.C. Dept. of Educ., Defined Minimum Program for South Carolina School Districts at 52 (1986), App. 71a-72a. South Carolina law sets forth explicit educational prerequisites to certification to teach children with particular types of handicaps. S.C. Code Regs. 43-62(K). App. 62a-71a.

individualized education program required under section 1414(a)(5).[7]

The court of appeals did not contest these facts nor otherwise contend that the Trident placement met the statutory definition of a free appropriate public education. It rather turned its attention to a different provision of the statute, section 1413, concerning the required elements of a state's plan to implement the statute. One of those state plan elements, set forth in section 1413(a)(4)(B), concerns policies and procedures to assure that:

> (i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, *if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency* . . .; and
>
> (ii) *in all such instances*, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

[7]The required content of the individualized education program is set forth in 20 U.S.C. § 1401(a)(20), App. 56a-57a, and contains substantial requirements in addition to the setting of goals.

(emphasis as in court of appeals decision, App. 12a) The court concluded from this language that, except where a child is placed in or referred to a private school by the state or local educational agency, the IDEA does not require that the private institution meet state educational standards. App. 13a.

The court acknowledged that this conclusion stands in direct conflict with the Second Circuit's decision in *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563 (2d Cir. 1989). App. 15a.[8] In that case, the court focused on the language of section 1401(a)(18)(B), defining the "free appropriate public education" which a state is obligated to provide as a condition of receiving funds under the Act. It concluded that reimbursement must be denied for placement in a private school not on the state's list of approved schools, because a free appropriate public education is defined under the statute as one which meets the standards of the state educational agency. 873 F.2d at 568.

The court of appeals' reading of section 1413(a)(4)(B) to override the state's unequivocal obligation and authority under the Act to provide a free appropriate public education is contrary to the plain words of the statute. Section 1413(a)(4)(B) imposes affirmative duties as to what must be included in the plan

[8]The court of appeals also pointed to the decisions of two other courts supporting the proposition that reimbursement for an appropriate education is proper even in cases where state approval of the private school children is absent. *See Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1160-61 (5th Cir. 1986); *Carrington v. Commissioner of Educ.*, 404 Mass. 290, 294-96, 535 N.E.2d 212, 215-16 (1989).

submitted by the state educational agency. It does not purport on its face to define the full extent of the duties imposed by the statute unrelated to the content of that plan, and thus there is no basis to view it as any qualification of the state's basic obligation under section 1412(1) to assure all disabled children a free appropriate public education as defined in section 1401(a)(18).

More fundamentally, the court of appeals' reading proves too much by rendering the obligation to provide a free appropriate public education inapplicable where the private school placement is selected unilaterally by the parents. If section 1413(a)(4)(B) really denied the state any duty or authority to enforce sections 1401(a)(18)(B) and (D), concerning state educational standards and conformity with the IEP procedure, where the parents unilaterally place the child in a private school, it could only be because the state had no duty to provide a free appropriate public education in that circumstance. It would also, therefore, necessarily relieve the state of its obligation under section 1401(a)(18)(A) to provide an education at public expense.[9]

The court of appeals' error goes to the fundamental nature of the IDEA as a statute providing federal funding

---

[9]Indeed the same result follows from the very language of section 1413(a)(4)(B)(i), taken in isolation, if one reads that section, as the court of appeals did, to set the outer limits of the state's statutory obligations. For within that very section, the obligation to provide special education and related services "at no expense to [the child's] parents or guardian," is, like the applicability of state educational standards, conditioned on the private school placement or referral being made by the state or appropriate local educational agency. *See* App. 58a-59a.

assistance on specified conditions, while leaving to the state and local educational agencies the "primary responsibility for developing and executing educational programs for handicapped children." *Rowley*, 458 U.S. at 183. Referral to a private school, whether by the school district, or unilaterally by the parents in the face of an inappropriate public school placement, *see Burlington*, does not terminate the state's obligation to the child under the statute, but is rather an alternative manner of fulfilling that obligation.[10] By demanding that the state provide a free appropriate public education, the statute imposes a continuing duty to see that those conditions are met -- not simply to pay the tuition and related bills submitted to it. 34 C.F.R. § 300.347(c).

Absent this continuing duty and authority on the part of the state to assure statutory compliance -- meaning the provision of a free appropriate public education as defined in the statute -- the IDEA would become a vehicle for serious mischief in the hands of loving parents seeking their vision of the best for their children at public expense. Under the court of appeals' decision, the incentive for parents to work closely with the governmental authorities is seriously weakened, contrary to the statute's clear intention to stimulate a stronger working partnership between parents and public school authorities. *See Rowley*, 458 U.S. at 205 (noting the great emphasis placed by Congress upon compliance with procedures giving parents and guardians a large measure

---

[10]Of course, if a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required to pay for the child's education. *See* 34 C.F.R. § 300.403.

of participation at every stage of the administrative process). Parents may have a variety of reasons for preferring to circumvent rather than capitalize on public school services to address the problems of their disabled children,[11] and the decision below is an open invitation for them to do just that. *See Tucker*, 873 F.2d at 567.

As the decision greatly impairs the state agencies' ability to secure active parental cooperation, it goes further, on a financial level, and threatens their ability to function equitably or perhaps at all. If school districts lack the authority to disapprove unilateral parental selections which the district must ultimately fund, it can be anticipated that parents will often look for the best possible education, whose provision at public expense the Act clearly was not intended to guarantee. *See Rowley*, 458 U.S. at 192 ("the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.") The result of such parental cherry-picking will be to worsen an existing financial crisis, at the expense of those students remaining in the system.[12]

---

[11]In this case, there is substantial evidence that the Carters were displeased with the very idea of their daughter attending the Timmonsville public school, and that their reasons for that view were related at least in part to the predominantly black racial make-up of the school. *See* note 3, *supra*.

[12]The present financial crisis which afflicts school districts across the country is well documented. *See, e.g.*, 29 Gov't Empl. Rel. Rep. (BNA) at 385 (April 1, 1991) ("The worst financial crisis to hit California education" has caused over 10,000 layoffs); Philip D. Block,

(continued on next page...)

This danger is well-illustrated by this case. The costs of educating Shannon at Trident, including tuition, travel costs associated with visits home, and room and board, amounted to more than $35,000, or nearly $12,000 per year. In contrast, the average per pupil expenditure in School District 4 is less than $3,900 per year. *See* S.C. Dept. of Educ., Ranking of the Counties and School Districts of South Carolina 1989-90 at 265, Table 96 (1991). School "resources are not unlimited and many other demands compete for limited public funds." *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1583 (D.C. Cir. 1984). Every dollar redirected to respondents in this case is lost to the students of this rural, predominantly black district.

---

[12](...continued from previous page)
Tough Action needed on school budget, Chicago Tribune, May 3, 1991, at 22 ("The Chicago public schools once again are facing a critical financial crisis.").

II. THE FOURTH CIRCUIT ACTED BEYOND ITS AUTHORITY UNDER THE ACT IN REJECTING AN INDIVIDUALIZED EDUCATION PROGRAM ("IEP") ON THE BASIS THAT THE GOALS STATED IN THE IEP WERE INSUFFICIENTLY AMBITIOUS, WHERE THE STATE AGENCY ACTED IN FULL COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS OF THE ACT, THE CHILD IN FACT RECEIVED SUBSTANTIAL EDUCATIONAL BENEFITS UNDER THE PROGRAM, AND THE GOALS STATED IN THE IEP WERE DELIBERATELY MADE MODEST AT THE REQUEST OF THE PARENTS' REPRESENTATIVE

In *Rowley*, this Court considered at length the standard set by the statute requiring that an "appropriate" education be provided, and the role of the federal courts in enforcing that guarantee. The Court there rejected contentions of a deaf student that the Act was intended to achieve actual equality of opportunity between disabled and non-disabled students, and concluded instead that a state satisfies the requirement of a free appropriate public education "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." 458 U.S. at 203. The Court further concluded that primary responsibility for "choosing the educational method most suitable to the child's needs" was left by the Act to the state and local educational agencies in cooperation with the parents or guardians of the child. *Id.* at 207.

Specifically with regard to judicial review, the Court stated that the judicial inquiry in suits challenging a particular placement is two-fold:

> First, has the State complied with the procedures set forth in the Act. And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits.[13]

458 U.S. at 206-207 (footnotes omitted). Following that approach, in the absence of a procedural dereliction, the courts of appeals have generally upheld IEP placements where the placement appears likely to enable the student to receive some educational benefits. *E.g.*, *Knight v. District of Columbia*, 877 F.2d 1025, 1029-1030 (D.C.Cir. 1989); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 993-994 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 1122 (1991); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152-154 (4th Cir.), *cert. denied*, 112 S.Ct. 175 (1991); *Rettig v. Kent City Sch. Dist.*, 788 F.2d 328, 332 (6th Cir.), *cert. denied*, 478 U.S. 1005 (1986); *Wilson v. Marana Unified Sch. Dist.*, 735 F.2d 1178, 1182-1184 (9th Cir. 1984); *Cain v. Yukon Public Schs., Dist I-27*, 775 F.2d 15, 20-21 (10th Cir. 1985).

Contrary to the approach of these and other courts, here the Fourth Circuit focused exclusively on the IEP's stated goals of four months' progress in math and reading to conclude that the program was "inappropriate" under the Act. It reasoned that Shannon was a "tenth-grade student whose reading and mathematics skills were at a

---

[13]The Court noted in a footnote to this sentence that when a handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit. 458 U.S. 207 n.28.

fifth and sixth grade level," and thus that the district court did not err in finding that the stated goal of "four months' progress over a period of more than one year was rather modest for a student such as Shannon and was unlikely to permit her to advance from grade to grade with passing marks." App. 8a.

It is undisputed on this record that Shannon's grades did significantly improve during the one month that she was working under the IEP developed in discussions between the school district and her parents, and that her grades were good enough to allow her to pass the ninth grade. Even if goals, which play a relatively limited role in the context of an IEP,[14] could ever provide a basis for finding inappropriateness, they certainly do not do so here. In this case, the social worker hired by Shannon's parents urged that the goals not be set too high, in order to strengthen Shannon's self-confidence.

Accordingly, the court of appeals here has cavalierly set aside the IEP promulgated by the School District, and created a precedent which can be expected to mislead future courts. Given the very large number of cases in which IEP's are challenged in court,[15] review is therefore warranted to provide guidance to the courts of appeals in order that the "appropriate education" standard of the Act be accurately and consistently applied.

---

[14]*Cf.* 34 CFR § 300.349 (goals and objective contained in the IEP do not bind the agency or any person).

[15]Since the decision was handed down in 1982, *Rowley* has been cited in over 300 federal district court and court of appeals published opinions. Review of many of these cases indicates that well over half involve challenges to IEPs under the Act.

CONCLUSION

The petition for writ of *certiorari* should be granted.

Respectfully submitted,

Of Counsel
Bruce E. Davis
1704 Fair Street
Camden, S.C. 29020
(803) 432-2880

DONALD B. AYER
(Counsel of Record)
BETH HEIFETZ
DAVID A. YALOF
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioners

March 23, 1992

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SHANNON CARTER, a minor by and through her father, and next friend, Emory D. Carter, *Plaintiff-Appellee,* v. FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, Superintendent, in his official capacity; SCHOOL BOARD MEMBERS; BENNIE ANDERSON, CHAIRMAN; MONROE FRIDAY; JACK ODOM; ELRITA BACOTE; T.R. GREEN; JAMES W. HICKS, in their official capacity, *Defendants-Appellants.*	No. 91-1047

Appeal from the United States District Court
for the District of South Carolina, at Florence.
C. Weston Houck, District Judge.
(CA-86-2028-2)

Argued: September 30, 1991

Decided: November 26, 1991

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, WILKINSON, Circuit Judge, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Justice Powell and Judge Michael joined.

COUNSEL

ARGUED: Bruce Edward Davis, Camden, South Carolina, for Appellants. Peter W. D. Wright, Richmond, Virginia, for Appellee. ON BRIEF: David R. Burlington, SOUTH CAROLINA PROTECTION AND ADVOCACY SYSTEM FOR THE HANDICAPPED, INC., Greenville, South Carolina, for Appellee.

OPINION

WILKINSON, Circuit Judge:

The Individuals with Disabilities Education Act (formerly the Education of the Handicapped Act), 20 U.S.C. § 1400 *et seq.*, requires states that receive federal funds for education of the handicapped to provide such children with a "free appropriate public education." 20 U.S.C. § 1412(1) (1988). In *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the

Supreme Court held that parents who believe that the education offered by the public schools is inappropriate may unilaterally place their child in a private school and are entitled to reimbursement from the state for tuition and expenses if it is subsequently determined that the public school system failed to comply with its statutory duties and that the private school provided an appropriate education. The question in this case is whether reimbursement under the Act is barred when parents have enrolled their disabled child in a private school that has not been approved by the state for the child's placement under the Act. We hold that placement in a private school not approved by the state is not a bar to reimbursement under the Act and therefore affirm the judgment of the district court ordering reimbursement.

I.

This case involves the education of Shannon Carter, who is now twenty-two years old. Shannon attended the first grade at Timmonsville Elementary School of Florence County School District Four, in which she resided with her parents. Shannon attended a nearby private school, the Roy Hudgens Academy, through grade six. She re-entered the public school system for the seventh grade during the 1982-83 school year.

Shannon performed poorly in school during the seventh grade. As a result, the school system tested her twice in early 1983 for potential learning disabilities. It concluded that, although Shannon scored slightly below average in achievement, she was not learning disabled. After Shannon performed badly during the first semester

of the ninth grade, her parents prompted the school district to conduct additional testing in April 1985. Based on this testing, the school psychologist concluded that Shannon was indeed learning disabled under the criteria set forth by the South Carolina State Department of Education (SDE). Although the disability went unnoticed by the school district for almost three years, the district court found that it was comparatively severe.

Following the April 1985 evaluation, the school district proposed an individualized education program (IEP) for Shannon at a meeting on May 1, 1985.[1] Under the school district's proposal, Shannon would have remained in regular classes but would have spent at least two periods per day in the resource room. Shannon's parents objected to the proposed resource room placement, believing that it would be inappropriate to place Shannon alongside students with emotional illnesses and mental retardation. Instead her parents requested a learning disabilities itinerant program in which Shannon would received individualized attention from a special education teacher. The adopted IEP,

---

[1]An IEP is a plan jointly developed by school officials and parents that contains, *inter alia*, an evaluation of the current levels of educational performance of the student, annual goals for educational advancement, a statement of the specific educational services that the school will provide the student, and objective criteria and evaluation procedures by which to measure whether the annual objectives are being achieved. *See* 20 U.S.C.A. § 1401(20) (West Supp. 1991). The IEP is "the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311 (1988). The Act requires that a school establish an IEP for each disabled child and review it at least annually. *See* 20 U.S.C.A. § 1414(a)(5) (West Supp. 1991).

which became effective May 2, 1985, and was to run through June 1986, placed Shannon in an itinerant program for three periods per week of individualized instruction, with the remainder of the week in regular classes. The IEP also contained specific goals for Shannon's educational progress. It set a goal of four months of reading progress during the school year, from a level of 5.4 (*i.e.*, fifth grade, fourth month) to one of 5.8. The mathematics goal also posited four months' progress, from a 6.4 level to a 6.8 level. The IEP was implemented for the month remaining in the 1984-85 school year.

Dissatisfied with the IEP, Shannon's parents requested a due process hearing to challenge the appropriateness of the school district's educational program. *See* 20 U.S.C. § 1415(b)(2) (1988); 34 C.F.R. § 300.506(a) (1991). Both the local education agency hearing officer and the state educational agency hearing officer rejected the arguments of Shannon's parents and concluded that the IEP provided Shannon with a free appropriate public education.

Because of their dissatisfaction with the school district's IEP, Shannon's parents placed her for the 1985-86 school year at the Trident Academy, in Mt. Pleasant, South Carolina, where she remained until graduation in 1988. Trident is a private school that enrolls only children with learning disabilities and specializes in the education of those whose learning disabilities are severe. Although Trident is accredited by the Southern Association of Colleges and Schools, approval of Shannon's placement at Trident had never been sought from the State Department of Education. On previous occasions, however, Trident's enrollment included

students sent there by public schools under the aegis of the Act, including three who were placed there by South Carolina public schools. There is no evidence that Trident Academy had ever been disapproved for placements under the Act by the SDE.

In July 1986, Shannon's parents filed suit on her behalf in the United States District Court for the District of South Carolina. The complaint alleged that the school district breached its statutory duty to provide Shannon a free appropriate public education and sought actual damages and "retroactive reimbursement for tuition costs so far incurred." After a bench trial, the district court found for Shannon. Although concluding that the school district had not breached the procedural requirements of the Act, it held that the school district violated the Act's substantive provisions by failing to provide Shannon with a free appropriate public education. The court concluded that the IEP's goals of a mere four months' progress in mathematics and reading allowed Shannon to "continue to fall behind her classmates at an alarming rate" and therefore "ensured the program's inadequacy from its inception." The district court also found itinerant study of only three periods per week inadequate to "allow her to receive passing marks and advance from grade to grade."

Turning to the question of reimbursement, the district court held that "Trident Academy provided Shannon an excellent education in substantial compliance with all the substantive requirements of the [Act]." The court relied on the testimony of a court-appointed expert who tested Shannon and concluded that she made significant progress at Trident. For example, Shannon's reading comprehensive advanced

from a level of 4.7 in 1985 to 7.8 in 1988 -- more than three years' progress over three school years. Moreover, the court concluded that "[n]othing in the existing law or regulations" barred reimbursement simply because the State Department of Education had not approved Shannon's placement by her parents at the Trident Academy. Thus, the district court ordered the school district to reimburse Shannon for tuition and fees, room and board, mileage to school, and four trips home per year for each of three years at Trident, which totalled $35,716.11 plus prejudgment interest.

The school district has appealed.

II.

The school district first challenges the district court's conclusion that it failed to provide Shannon a free appropriate public education. In order to satisfy the Act's requirement that the state provide a free appropriate public education, the IEP must be "reasonably calculated to enable the child to receive educational benefits." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). In particular, "[w]hen the handicapped child is being educated in the regular classrooms of a public school system" -- as Shannon was here -- "the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit." *Id.* at 207 n. 28. And as this court has noted, "[c]learly, Congress did not intend that a school system could discharge its duty under the [Act] by providing a program that produces some minimal academic advancement, no matter how trivial." *Hall ex rel. Hall v. Vance County Bd. of Educ.*,

774 F.2d 629, 636 (4th Cir. 1985). *See also Board of Educ. v. Diamond*, 808 F.2d 987, 991 (3d Cir. 1986).

In light of these principles, we cannot say that the district court's conclusion was clearly erroneous. The school district drafted the IEP to apply to a learning disabled tenth-grade student whose reading and mathematics skills were at a fifth and sixth grade level, respectively. Although the amount of appropriate advancement will necessarily vary depending on the abilities of individual students, *see In re Conklin*, No. 89-2220(L), slip op. at 18-19 (4th Cir. Oct. 4, 1991), the district court did not err in finding that a goal of four months' progress over a period of more than one year was rather modest for a student such as Shannon and was unlikely to permit her to advance from grade to grade with passing marks. Thus, it was proper for the district court to conclude that the itinerant program failed to satisfy the Act's requirement of more than minimal or trivial progress.

The school district suggests that the Act's preference for "mainstreaming" handicapped students, *see* 20 U.S.C.A. § 1412(5)(B) (West Supp. 1991); 34 C.F.R. §§ 300.550-300.556 (1991), justifies its IEP and makes the public school placement superior to Trident, which educates only children with disabilities. The Act's mainstreaming policy, however, is of no avail to the school district here. Under the Act, mainstreaming is a policy to be pursued so long as it is consistent with the Act's primary goal of providing disabled students with an appropriate education. Where necessary for educational reasons, mainstreaming assumes a subordinate role in formulating an educational program. *See Rowley*, 458 U.S. at 181 & n. 4; *Daniel R.R. v. State Bd. of Educ.*, 874

F.2d 1036, 1044-45 (5th Cir. 1989). In any event, the Act's preference for mainstreaming was aimed at preventing *schools* from segregating handicapped students from the general student body, *see Burlington*, 471 U.S. at 373; H.R. Rep. No. 332, 94th Cong., 1st Sess. 2 (1975); the school district has presented no evidence that the policy was meant to restrict *parental* options when the public schools fail to comply with the requirements of the Act.

Likewise, that Shannon's parents rejected the school district's proposed resource room placement in favor of the less intensive itinerant program does not relieve the school district of liability here. There was no finding by the district court that the alternative rejected by Shannon's parents would have provided an appropriate education. In the absence of such a finding, it is conceivable that the resource room placement would have been *less* appropriate than the IEP upon which the parties eventually settled. Thus, the case in which parents reject a plainly appropriate IEP is simply not before us.

III.

The school district next argues that the Act does not permit reimbursement when parents unilaterally withdraw their child from the public school system and enroll him or her in a private school that has not been approved by the state for the child's placement under

the Act. For the reasons explained below, we must reject this contention.[2]

A.

We begin with a brief review of the law governing reimbursement for private school education under the Individuals with Disabilities Education Act. The Act itself does not explicitly authorize the reimbursement of parents for expenses incurred when they unilaterally place their child in a private school out of a belief that the education offered by the public schools is not "appropriate." The Act's language does, however, direct a court to "grant such relief as [it] determines is appropriate." 20 U.S.C. § 1415(e)(2) (1988). In *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359 (1985), the Supreme Court held that Congress intended this remedial provision to authorize a court to order reimbursement when the court concludes both that the public school system failed to provide a free appropriate public education and that the private school chosen by the parents did provide an appropriate education to the child. *See id.* at 369-70. Because administrative and judicial review of a school system's program under the Act is "ponderous," parents who believe that the public schools are not offering their child an appropriate education are faced with a choice:

---

[2]The school district does not dispute the district court's conclusion that Trident Academy provided Shannon with an appropriate education, which is a prerequisite to reimbursement under *Burlington*. *See* 471 U.S. at 370. Nor does the school district challenge the amount of reimbursement ordered by the district court.

> [G]o along with the IEP to the detriment of their child if it turns our to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, . . . it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not . . . be reimbursed by the school officials.

Id. at 370. Such a result, according to the Court, would leave "the child's right to a *free* appropriate public education . . . less than complete. *Id.* (emphasis in the original).

B.

In *Burlington*, the state's department of education had approved the parents' private school placement. *See id.* at 363. Here, by contrast, neither Shannon's parents nor the school district sought state approval for Shannon's placement at Trident, and therefore such state approval was never given. The school district argues that the latter fact by itself bars reimbursement under the Act. Moreover, the school district suggests that a placement at Trident would not have been approved even had an application been presented to the SDE. First, although its educational program in many ways parallels what is required under the Act, Trident does not attempt to comply with the terms of the Act. Trident does not, for example, develop educations plans called IEPs, though it does set goals for students and revise them four times per school year. Second, at the time of trial there were at least two faculty members at Trident -- including one of Shannon's teachers -- who were not certified by the state. Under state law, these

teachers are prohibited from teaching in a South Carolina public school. *See* S.C. Code §§ 59-21-550, 59-25-20 (1990); S.C. Code Regs. 43-205 (1982).

We do not think that these facts are fatal to the request for reimbursement. In suggesting that reimbursement is proper only when parents place their child in a private school approved by the state, the school district misreads the statute. The pertinent provision of the Act requires that states:

> [S]et forth policies and procedures to assure . . . that--
>
> (i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, *if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency* as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State; and
>
> (ii) *in all such instances*, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies . . . .

20 U.S.C.A. § 1413(a)(4)(B) (West 1990 & Supp. 1991) (emphasis added).

As indicated by the italicized passages, Congress clearly envisioned that § 1413(a)(4)(B), and its requirement that private schools receiving funds under the Act meet state educational standards, would apply only when the child is placed in the private school by the state or local school system. The Act itself simply imposes no requirement that the private school be approved by the state in parent-placement reimbursement cases. there is no indication to the contrary in the Act's legislative history, *see, e.g.*, S. Rep. No. 168, 94th Cong. 1st Sess. 32, 50, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1456, 1473, and federal regulations and South Carolina law similarly apply state educational standards to private schools only when the child is placed there by the state or the school district. *See* 34 C.F.R. §§ 300.400-300.403 (1991) (state educational standards apply to "a handicapped child who is placed in or referred to a private school or facility by a public agency"); *id.* § 300.347 (state responsibility for IEPs when "a public agency places a handicapped child in, or refers a child to, a private school or facility"); S.C. Code § 59-33-50 (1990) ("When a school district cannot . . . provid[e] for the education of its resident handicapped children because of insufficient numbers, the district may contract with other districts within the State or school systems or public or private institutions or agencies within or without the State which maintain approved special educational facilities. . . ."); S.C. Code Regs. 43-243(E)(7) (1982) ("Whenever handicapped children are placed in private schools by the SEA/LEA [state or local educational agency], such private schools

must be in compliance with the standards of the SEA/LEA").

We agree with the district court that *Schimmel ex rel. Schimmel v. Spillane*, 819 F.2d 477 (4th Cir. 1987), on which the school district relies, is not to the contrary. In *Schimmel*, the parents never demonstrated that the private school placement proposed by the state would not have offered an appropriate education; thus, the state placement provided the child everything to which he was entitled under the Act and the parents' claim for reimbursement for an out-of-state private placement was properly denied. *See Goodall ex rel. Goodall v. Stafford County Sch. Bd.*, 930 F.2d 363, 367-69 (4th Cir. 1991); *Hessler ex rel. Britt v. State Bd. of Educ.*, 700 F.2d 134, 139 (4th Cir. 1983). Here, by contrast, the district court held that the placement proposed by the state was not appropriate. Although the *Schimmel* court did note that "[t]he statute simply does not permit *school systems to place* and fund handicapped children in unapproved private schools," 819 F.2d at 484 (emphasis added), this language states only the unremarkable proposition that the *public schools* may not place a child in a private school that has not been approved by the state. *See, e.g., Antkowiak ex rel. Antkowiak v. Ambach*, 838 F.2d 635, 639-40 (2d Cir. 1988). *Schimmel* did not present the situation where, as here, the placement offered by the public schools is inappropriate under the Act and the parents are forced by the school system's violation of the

Act to unilaterally withdraw the child from the public schools and, on their own, seek alternative schooling.[3]

We recognize that courts have differed on the question presented here. Several courts have allowed reimbursement despite the absence of state approval of the private school chosen by the parents. *See Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1160-61 (5th Cir. 1986); *Carrington v. Commissioner of Educ.*, 404 Mass. 290, 294-96, 535 N.E.2d 212, 215-16 (1989). By contrast, in *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563 (2d Cir. 1989), the Second Circuit concluded that parents may not obtain reimbursement for unilateral placements in unapproved private schools. The court based its reasoning on the Supreme Court's statement in *Burlington* that reimbursement is appropriate only "if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." 471 U.S. at 369, 105 S.Ct. at 2002. Because the Act defines the term

---

[3]For similar reasons, we find *In re Co... , supra,*, to be inapposite. In *Conklin*, the district court held that the educational program offered by the state, through the State Board of Education hearing review panel, provided a free appropriate public education under the Act -- and, indeed, offered *more* than the Act required. *See*, slip op. at 10-11, 16. Thus, as in *Schimmel*, the state satisfied its statutory obligations and the claim for reimbursement was therefore properly denied. Although in *Conklin* there is language that would decline to hold a state accountable for an unapproved private placement, *see id.* at 10 n.5, the court simply was not presented with, and did not purport to address, the statutory and precedential arguments that arise when a district court finds both that the state has defaulted on its obligations under the Act and that the private school chosen by the parents provides an appropriate education.

"free appropriate public education" to mean, *inter alia*, "special education and related services that . . . meet the standards of the State educational agency," 20 U.S.C. § 1401(a)(18)(B) (1988), the *Tucker* court concluded that a private school placement cannot be "proper under the Act," even if made by parents rather than public school officials, when the private school in question does not "meet the standards of the State educational agency." *Tucker*, 873 F.2d at 568.

We must respectfully decline to follow the *Tucker* decision. First, in relying on a general definition for its holding, *Tucker* did not address the specific language in 20 U.S.C. § 1413(a)(4)(B)(ii), which by its terms applies state educational standards only when a child is placed in a private school by public school officials. That language was intended by Congress to protect the interests of handicapped children placed in private schools by the state. Had Congress intended to take the very different step of limiting the appropriate relief due handicapped children when their parents choose a private school, there would have been no reason for Congress to have limited § 1413(a)(4)(B)(ii) by its terms to placements by the state. The *Tucker* court, by focusing only on a general definition, thus appears to have created a significant and unwarranted restriction upon the ability of otherwise eligible children to seek relief.

Second, we do not believe that the Supreme Court, by requiring that the private school placement be "proper under the Act," intended to impose on private schools chosen by parents the whole panoply of duties that the Act imposes on the state. Rather, when a public school system has defaulted on its obligations

under the Act, a private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits," *Rowley* 458 U.S. at 207 -- the same standard by which the appropriateness of a public school's IEP is assessed. *See Tice ex rel. Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1208 (4th Cir. 1990) (standard is whether private placement "was proper to meet the Act's educational goals").

In sum, we do not believe that the Act as written forbids reimbursement when parents place their child in a private school that has not been approved by the state, and we join those courts that have so held. As interpreted by *Burlington*, the Act imposes only two prerequisites to reimbursement: that the program proposed by the state failed to provide the child a free appropriate public education, and that the private school in which the child is enrolled succeeded in providing an appropriate education, *i.e.*, an education that is reasonably calculated to enable the child to receive educational benefits.

C.

Conditioning reimbursement under *Burlington* on state approval of the private school would undermine the values and policies the Act was enacted to further. "The Act represents an ambitious federal effort to promote the education of handicapped children. . . ." *Rowley*, 458 U.S. at 179. Congress sought to promote this goal by conditioning the receipt of federal funds on the implementation of state programs designed to ensure that disabled children are provided with educational

opportunities, including special education and related services, that are tailored specifically to meet their unique needs. *See* 20 U.S.C.A. § 1400(c) (West Supp. 1991). Because Congress intended that the Act "result in maximum benefits to handicapped children and their families," S. Rep. No. 168, 94th Cong., 1st Sess. 6, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1430, the Act's remedial provision -- which authorizes the district court to "grant such relief as [it] determines is appropriate," 20 U.S.C. § 1415(e)(2) (1988) -- is "a board grant of equitable power designed to provide courts maximum flexibility in effectuating the statutory objectives." *Doe v. Brookline Sch. Comm*, 722 F.2d 910, 919 (1st Cir. 1983).

The Act envisions, of course, that the primary providers of educational opportunities for handicapped children will be the public schools. When those schools fail to meet their responsibilities, however, parents may be left to their own devices in finding a school that provides the specialized educational environment necessary to educate their children. In such circumstances, it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place.

Finally, it must be emphasized that parents who unilaterally place their child in an unapproved private school bear substantial risks -- risks that function to ensure that our decision will not be a means through which parents can subvert the Act's emphasis on public education. If the court finds that the public schools did

in fact provide a free appropriate public education, the parents cannot receive reimbursement, whether or not the private school in question is state approved. *See, e.g., Goodall*, 930 F.2d at 367-69. Further, reimbursement is barred if the court finds that the private school chosen by the parents failed to provide an appropriate education. *See, e.g., Tice*, 908 F.2d at 1207-08 & n. 11. It may be that the possibility of the latter is enhanced when the private school in which the child is enrolled is not approved by the state. In the absence of a statutory command that the choice of an unapproved private school is not the parents' to make, however, that risk is simply one factor that the parents must consider in deciding where to education their child.

IV.

We in no way disparage the process through which states impose standards upon public schools and certify teachers as qualified to teach in particular subject areas. Such state regulatory mechanisms play a positive and important role in ensuring educational quality. Thus, when parents unilaterally place their child in a private school that has not been approved by the state, they invariably bear some risk that the school will fail to provide an adequate education. Nonetheless, we simply cannot convert state approval of a parent's private school placement of a handicapped child into a condition for reimbursement under *Burlington* when that private school meets the needs of the child in the manner contemplated by the Act and when the state has defaulted on its statutory obligations.

The judgment of the district court is hereby AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA -
FLORENCE DIVISION

SHANNON CARTER, a minor by and through her father and next friend, EMORY D. CARTER,	)	
Plaintiff	)	
vs.	)	
FLORENCE COUNTY SCHOOL DISTRICT FOUR: ERNEST K. NICHOLSON Superintendent, in his official Capacity; SCHOOL BOARD MEMBERS: BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T. R. GREEN, and JAMES W. HICKS, in their official capacities,	)	CIVIL ACTION NO. 4:86-2028-2
Defendants.	)	

This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff shall have judgment against the defendant in the

amount of Thirty Five Thousand Seven Hundred Sixteen and 11/100 Dollars ($35,716.11) with prejudgment interest to run at the rate of 7.91% per annum from December 31, 1989 through December 31, 1990 and prejudgment interest at the rate of 6.62% per annum to run from January 1, 1991 through January 31, 1991 with postjudgment interest thereon at a rate of 6.62% as provided by law, plus her costs of action and this action is hereby dismissed.

February 6, 1991
Date

ANN A. BIRCH
Clerk

/s/ Tish Singletary
(By) Deputy Clerk,
Tish Singletary

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

SHANNON CARTER, a minor by and through her father and next friend, EMORY D. CARTER, Plaintiff, v. FLORENCE COUNTY SCHOOL DISTRICT FOUR; ERNEST K. NICHOLSON, Superintendent, in his official capacity; SCHOOL BOARD MEMBERS: BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T. R. GREEN, and JAMES W. HICKS, in their official capacities, Defendants.	) Civil Action No. 4:86-2028-2)))

2. At the beginning of the 1982-1983 school year, Shannon reentered public school in Timmonsville and was enrolled in the seventh grade.

3. At some time in the early part of 1983, Shannon was given some screening tests by the junior high school guidance counsellor to obtain an indication of her I.Q. and achievement level. In February 1983, the guidance counsellor contacted the school district's educational evaluator, Mr. Ray Hill, to conduct similar tests. Mr. Hill testified that he administered one intelligence and one achievement test to Shannon in February 1983. According to Hill, Shannon scored slightly below average achievement and, thus, did not qualify as learning disabled.[2]

4. In the fall of 1984 Shannon entered the ninth grade at Timmonsville High School and was placed in a regular classroom. Shannon continued to perform poorly as reflected by her first semester averages.[3] This continued poor performance prompted Shannon's parents to seek additional testing for her. In February 1985, Mrs. Carter contacted the school district to request another evaluation.

---

[2]The actual test results were not available at trial. Hill stated that after a thorough search of his files he was unable to locate Shannon's 1983 test results. This is most unfortunate because all of the experts who testified on the subject were in agreement that, absent a traumatic injury to the head, a learning disability does not naturally develop in a child who previously did not suffer from one.

[3]Shannon's first semester averages were as follows: English 9 - D; Pre-Algebra - F; Physical Science - D; Civics and Geography - F; and Physical Education - F.

5. On April 13, 1985, Shannon was again tested by Mr. Ken Bailey, a state certified school psychologist. Following the evaluation it was agreed that a meeting would be held to discuss its results. At the meeting held on April 18, 1985, Bailey reported Shannon's evaluation results concluded that, based on State Department of Education criteria, Shannon qualified for a learning disability (LD) placement. He explained that there existed "a significant discrepancy between ability and achievement according to the one and one-half standard deviation difference formula. . . ."[4] This evaluation indicates a serious learning disability, with a variance between Shannon's verbal I.Q. and performance I.Q. of 36 points.[5] Various subtests administered by Bailey yielded reading ability levels from 4.7 grade level equivalency to a 6.8 level.

6. Shannon suffers from a serious and significant learning disability. Testimony from Dr. James Ward and Dr. Allison Grant indicate that Shannon's learning disability is on the severe end of the scale. According to Shannon's parents and Dr. Grant, Shannon also suffered from significant emotional overlay manifested by depression, feelings of low self-worth and self-esteem, as well as suicidal thoughts. Testimony from Ms. Margaret Mitchell of Trident Academy indicates that Shannon entered Trident Academy in the fall term of 1985 as a functional illiterate.

---

[4]Report of Dr. Bailey, plaintiff's exhibit 3.

[5]The verbal I.Q. was 81 and the performance I.Q. was 117.

7. Subsequent to the evaluation performed by Bailey, an IEP meeting was scheduled for May 1, 1985. Numerous personnel from Florence County School District Four were present as well as the parents of Shannon and Ms. Linda Summer.[6] During that meeting, the IEP proffered by the district was read to the Carters. The school district was of the opinion that an L.D. resource class would be the appropriate placement for Shannon. The parents disagreed and requested an L.D. itinerant program.[7] According to the parents' testimony, their reasoning was that it would be inappropriate for Shannon to be in a resource class with other special education students with emotional illnesses and/or mental retardation. Lisa Free, the L.D. teacher at Timmonsville High School, testified that the majority of her students that year were mentally retarded and that segregation between these students and her L.D. students was improbable.

---

[6]Ms. Summer is a psychiatric social worker from Florence, South Carolina. She was employed by the plaintiff's parents and first examined the plaintiff on February 19, 1985. She testified in the administrative phase of this proceeding and was present during the trial in this court but did not testify.

[7]Pursuant to 20 U.S.C. § 1412 the South Carolina State Board of Education adopted Regulations 43-243 which at page 144 explained the difference between an itinerant program and a resource class as follows: In an itinerant program the specialist will provide continual ongoing services to handicapped pupils and teachers taught in regular classroom settings. A resource room program shall involve pupils who will remain in regular classrooms for the major part of the day and will be scheduled into the resource room for one or more periods of individualized instruction contingent on pupil's needs.

8. Despite the disagreements that existed between Shannon's parents and the school district, the IEP document was nonetheless prepared and submitted to the Carters for signature.[8] Implementation of the plan commenced on May 2, 1985, and by its clear language was to run until June 1986.[9] Shannon's ultimate placement under this IEP was three periods of L.D. itinerant classes per week. A period in district four is a little less than one hour.

9. Several long range goals were written into the IEP. The reading goal specified four months of progress during the year, from a 5.4 level to a 5.8 level. The mathematics goals was similarly one for four month's progress, from a 6.4 level to a 6.8 level. In light of the expert testimony of Ms. Mitchell, Dr. Grant and Dr. Ward, it is clear that these goals were wholly inadequate. Much more progress was necessary in order to provide Shannon an appropriate education. Shannon was in need of an intensive self-contained L.D. environment to afford her with an individualized special education to meet her unique needs.

---

[8]There was considerable dispute during the trial as to whether the parents signed the document knowingly and voluntarily. This issue is of no import; clearly the Carters were not satisfied with the plan. The IEP is not a binding contract and either party can seek changes at any time. The fact that their signature appears on the document does not effect the outcome of this case to any extent whatsoever.

[9]The school district would have this court believe that the IEP was only intended for the remainder of the school year. However, the IEP states in clear and unambiguous language that it was to run until June 1986.

10. Shannon's parents were ultimately dissatisfied with the district's plan and sought a due process hearing pursuant to 34 CFR § 300.506(a). The hearing was held on August 20, 1985, in Timmonsville, South Carolina. In a decision dated September 5, 1985, the hearing officer held for the district. The Carters appealed this decision to the state level. The hearing officer's decision was upheld on October 14, 1985.

11. In response to their dissatisfaction with the IEP Shannon's parents began a search for an appropriate placement for Shannon. Ultimately, they selected Trident Academy in Mt. Pleasant, South Carolina. Trident Academy is a private day school specializing in the education of learning disabled children. Shannon began courses at Trident in September 1985, and remained there until her graduation in the spring of 1988.

12. Trident Academy is fully accredited by the Southern Association of Colleges and Schools and has accepted public school students under the dictates of the EAHCA on numerous occasions, including at least three instances from South Carolina public schools. In these instances, EAHCA tuition monies were paid directly from the school districts to Trident. The district has offered no evidence that Trident has ever been disapproved by the South Carolina Department of Education.[10]

---

[10]Although Dr. Black testified in the abstract about possible disapproval of the school because it employs one non-certified teacher, this is not fatal to the plaintiff's case.

13. In light of conflicting testimony as to the appropriateness of Trident, the court's appointed expert, Dr. Richard Nagle, tested Shannon in the spring of 1988. His tests revealed that Shannon made significant progress at Trident. Her reading comprehension had risen from a level of 4.7 in 1985 to 7.8 in 1988. Based on these tests, Dr. Nagle concluded that Trident had done a good job of meeting the individualized needs of Shannon. The court agrees with Dr. Nagle's assessment as well as the assessments of Dr. Ritter, Dr. Ward, Dr. Grant and Ms. Mitchell that the education offered at Trident Academy has been an appropriate special education for Shannon.

14. As a result of enrolling Shannon at Trident Academy, the Carters incurred the following expenses:

	85-86 School Year	86-87 School Year
Tuition and fees	$ 6,992.00	$ 8,484.00
Room and Board	3,600.00	3,600.00
Milage to school	158.40	158.40
4 trips home	221.76	221.76
	$10,972.16	$12,464.16

87-88 School Year

Tuition and fees	$ 8,139.70
Room and board	1,869.69
Milage to school	2,059.20
4 trips home	211.20
	$12,279.79

15. The court finds that the tuition and fees charged by Trident were reasonable for the services it provided. The court is persuaded by the fact that Trident offers these services on the open market and that the economics of supply and demand are in operation. Further, the defendant has offered no evidence that Shannon could have received the special educational services provided by Trident at any facility closer to her home or at a lower cost.[11] Therefore, the Carters are entitled to reimbursement for tuition and fees in the amount of $23,615.70, for the three school years that Shannon attended Trident.

16. For the 1985-86 and 1986-87 school years, Shannon boarded with a Mt. Pleasant resident, Ms. Mary Ann Griffin. During the 1987-88 school year, Shannon roomed in a private apartment with her older brother in the Charleston area. Since Timmonsville and Trident Academy are a considerable distance from one another, it was reasonable for Shannon to board somewhere in the area of Trident. The room and board expense of $9,069.69 was a logical and legitimate consequence of Shannon's attending a school away from her home. We find that said amount is a reasonable additional expense necessitated by Shannon attending an out of town school.

---

[11]There was some suggestion that Shannon could have received special education services at Florence School District One. However, there was no evidence that the defendant ever presented this as an option. The parents were, of course, prevented by state law from independently seeking a placement for Shannon in any public school outside of her district.

17. During the 1985-86 and 1986-87 school years Shannon traveled approximately 20 miles per week to attend Trident Academy at a cost each year of $158.40. This expense increased to 52 miles per day and a total of $2,059.20 during the school year 1987-88. The court finds these milage expenses for Shannon's transportation to and from school to be reasonable and recoverable.[12] Therefore, the Carters are entitled to a total of $2376.00 for Shannon's transportation to and from school.

18. The four trips home each year were a reasonable and necessary expense and shall be allowed. Therefore, the Carters are entitled to reimbursement for those expenses in the amount of $654.72.

19. It is impossible to compute with accuracy the amount of prejudgment interest that the plaintiff is entitled to recover in this action. Her father borrowed some of the money spent for education related expenses from the Pee Dee State Bank, Timmonsville, South Carolina. The record reflects that the interest paid or obligated to be paid on that sum through December 31, 1989 is $6519.04.[13] The amount of plaintiff's expenses

---

[12]The milage expenses for the school year 1987-88 are substantially greater than those for the preceding two years. In finding the same to be reasonable we have also considered the fact that room and board expenses for the same period were correspondingly lower than those for the preceding two years.

[13]Plaintiff's exhibit 36 reflects the amount of interest paid by the Carters through December 31, 1988. Plaintiff's exhibit 37 indicates the per diem interest on the loan. Since the loans were made from January 1 through December 31 of each year, interest was computed at the per diem rate through December 31, 1989.

paid from funds other than those borrowed from Pee Dee State Bank cannot be determined, and no interest can be awarded therefor. Likewise, the record is silent as to any interest paid by plaintiff's father after December 31, 1989. From that day through December 31, 1990, all sums required herein to be paid by the defendant to the plaintiff shall accrue interest at the rate of 7.91% per annum.[14] During the month of January 1991, the prejudgment interest rate shall be 6.62% per annum which is the yield of Fifty-two Week Treasury Bills during that month.

CONCLUSIONS OF LAW

A. Jurisdiction is conferred upon the court by 28 U.S.C. § 1331 and 28 U.S.C. § 1343(3) and (4).

B. The Education of the Handicapped Act, 20 U.S.C. § 1401 *et seq*. (1976 ed. and Supp. IV), provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a state's compliance with extensive goals and procedures. The EHA represents an ambitious federal effort to promote the education of handicapped children and was passed in response to Congress's perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when

[14]Fifty-two Week Treasury Bills are sold by auction on a monthly basis. Records of those sales are maintained in the office of the clerk of this court, and the 7.91% rate is an average of the monthly yields of said bills during 1990 as computed from those records.

they were old enough to 'drop out.'" H. R. Rep. No. 94-332, p. 2 (1975).

C. The "free appropriate public education" required by the EHA is tailored to the unique needs of the handicapped child by means of an individualized educational program. § 1401(18). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, and the child's parents consists of a written document containing,

> (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, includ-ing short-term, instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to partici-pate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved. § 1401(19).

D. In the leading case on the subject, *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176 (1981), the Supreme Court has held that the requirement that the state provide a handicapped child with a "free appropriate public education" is met by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be

provided at public expense, must meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's IEP. In addition, the IEP, and, therefore, the personalized instruction should be formulated in accordance with the requirements of the EHA and, if the child is being educated in the regular classrooms of the public school system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Rowley*, at 204-205.

E. The EHA permits "[a]ny party aggrieved by the findings and decision" of the State administrative hearings "to bring a civil action" in "any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." § 1415(e)(2). When a suit is brought under the EHA, the court's inquiry is twofold. First, has the state complied with the procedures set forth in the EHA? And second, is the individualized educational program developed through the EHA's procedures reasonably calculated to enable the child to receive educational benefits?

F. In the present case the plaintiff contends that the school district's behavior was afflicted with "serious procedural infirmity" regarding compliance with the elaborate procedural requirements of the EHA, thereby invalidating the May 1, 1985, IEP. Such compliance is critical to the efficient operation of the EHA, and serious procedural noncompliance can by itself support a finding that the child has not been provided with a FAPE. *Hudson by and through Tyree v. Wilson*, 828 F.2d 1059 (4th Cir. 1987), citing *Hall v. Vance County Board*

of Education, 774 F.2d 629, 635 (4th Cir. 1985). The Carters contend that they were confronted at the May 1, 1985, IEP meeting with a completed IEP as if it were a *fait accompli*, with no opportunity to contribute to the content or development of the document.

G. It has been held "appropriate for agency staff to come prepared with evaluation findings, statements of present levels of educational performance, and a recommendation regarding annual goals, short term instructional objectives, and the kind of special education and related services to be provided. However, the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents." *B.G by F.G. v. Cranford Board of Education*, 702 F.Supp. 1158, 1165 (D.N.J. 1988). While there is considerable dispute as to what actually took place at the meeting, the court concludes that there has been no serious procedural non-compliance on the part of the school district.

H. Turning now to the court's second inquiry, it should be noted that there exists no single substantive standard describing exactly how much educational benefit is sufficient to satisfy the EHA. Each case must be determined on a case-by-case basis, *Hall v. Vance County Board of Education*, 774 F.2d 629, 635 (4th Cir. 1985), but, as the *Rowley* decision makes clear, "[w]hen the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit." *Rowley*, at 207, N. 28.

I. The IEP prepared on May 1, 1985, did not provide Shannon with a free appropriate public education as required by the EHA. Even if all of the goals of the document had been met, Shannon would continue to fall behind her classmates at an alarming rate. The stated progress of only four months in her reading and math skills over an entire school year ensured the program's inadequacy from its inception. Furthermore, the district's offer of only three periods of itinerant study a week failed to meet Shannon's educational needs. At a minimum, which is all the EHA requires, the district was obligated to provide Shannon an individualized program that would allow her to receive passing marks and advance from grade to grade. Having failed to do this, the court concludes that Florence County School District Four failed to provide Shannon Carter with a free appropriate public education.

J. It is now settled that parents may be entitled to tuition reimbursement despite the unilateral withdrawal of their child from the public school. *Burlington School Committee v. Department of Education*, 471 U.S. 359 (1985). The parents, of course, withdraw the child at the risk that the subsequent administrative and judicial review will establish that the contested placement provided a FAPE. In *Burlington* the court noted the cruel dilemma an arguably inappropriate placement offers the parents if they have no possibility of reimbursement for expenses resulting from an unilateral withdrawal. They may either leave the child in an inappropriate classroom pending the long process of review or remove the child and waive any right to tuition reimbursement for alternative schooling while review is taking place. The court accordingly held that a prior unilateral withdrawal did not waive the child's right to

such an equitable remedy at the end of the review process. *Burlington*, at 370.

K. There appears no doubt, then, that the Carters were entitled to withdraw their child from the public school because of its failure to provide a FAPE. The remaining issue concerns whether or not the Carters had a right to place Shannon at Trident Academy. From the outset it should be noted that the evidence established that Trident Academy provided Shannon an excellent education in substantial compliance with all the substantive requirements of the EHA. Although it did not comply with all of the procedures outlined in the EHA, it evaluated Shannon quarterly, not yearly as mandated in the EHA, it provided Shannon with low teacher-student ratios, and it developed a plan which allowed Shannon to receive passing marks and progress from grade to grade. The court concludes that Shannon received an appropriate education, within the meaning of the EHA, at Trident Academy.

L. The defendants, relying on the recent case of *Schimmel by Schimmel v. Spillane*, 819 F.2d 477 (4th Cir. 1987), argue that the plaintiff herein is not entitled to tuition reimbursement because they placed her in school that had not been approved by the South Carolina State Department of Education. *Spillane* is clearly distinguishable from the present case. In *Spillane*, the parents and the school were in agreement that the child needed to be placed in a residential school, and the school system agreed to pay the cost of such placement at the Little Keswick School near Charlottesville, Virginia. Little Keswick is a private residential school which is approved by the Virginia Department of Education as a school for the handicapped. The

parents declined to enroll their child at Little Keswick and instead enrolled him at a private school in Vermont. After the school refused to place the child at the Vermont School, the parents sought a due process hearing. At that hearing it was held that the Virginia school offered an appropriate education. This decision was upheld on appeal to the state reviewing officer. The parents then brought suit in the district court where judgment was entered for the school district. The Fourth Circuit Court of Appeals affirmed. *Schimmel by Schimmel v. Spillane*, 819 F.2d 477 (4th Cir. 1987). This court has no quarrel with the *Schimmel* decision and agrees with the same.

In the instant case the situation is quite different. We are not dealing with referral to a private school with a public agency so as to make § 1413 (a)(4)(B) of the EHA and 34 CFR § 300.401(a)(3) applicable. This case involves a situation where the school district failed to provide the child with a free appropriate public education, and the only way the parents could provide the same to their daughter within a meaningful time frame was to enroll her in a private school. Nothing in the existing law or regulations convinces this court that the stringent requirements advanced by the defendants should be applied to such a unilateral placement.

M. Congress has provided that in all actions brought in this court under the EHA "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court deems is appropriate." 20 U.S.C. § 1415 (e)(2)(c). The United States Supreme Court has said that "equitable considerations are

relevant" in determining the appropriate relief mandated by the statute. This court, therefore, concludes that the plaintiff should be entitled to recover all reasonable expenses incurred by her parents in enrolling her in Trident Academy for the last three years of her high school education. These expenses should, of course, include prejudgment interest.

ORDER

The plaintiff shall, therefore, have judgment against the defendant in the amount of $35,716.11 plus prejudgment interest computed in the manner herein specified[15] and costs. AND IT IS SO ORDERED.

/s/ C. Weston Houck
C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

Florence, South Carolina
January 30, 1991

---

[15]Prejudgment interest shall also be computed in accordance with 28 U.S.C. § 1961(b).

SEA IMPARTIAL REVIEW OF THE DUE PROCESS HEARING CONCERNING SHANNON ELAINE CARTER

NATURE AND PURPOSE OF THE REVIEW

The review was conducted because Mr. and Mrs. Emory Carter, the parents of Shannon Elaine Carter, appealed the decision of Heyward S. Rosemond, the Hearing Officer at the Local Educational Agency (LEA) level.

On September 20, 1985, the typed notarized proceedings and exhibits were personally received and signed for by the hearing officer.

On September 25, 1985, the Petitioner's Argument was received by the hearing officer, along with a notarized certificate of mailing attesting that a copy of same had been mailed to the attorney for the LEA.

The review was begun on September 25 and completed on October 12, 1985.

As instructed under Rules and Regulations governing P.L. 94-142 Section 121a.510 and section 121a.512, the following actions have been taken:

1. The entire hearing record of Shannon Elaine Carter and the Petitioner's Argument in the same matter have been received, studied and reflected upon.

2. According to all of the information, it appears that the procedures were consistent with the requirements of Due Process.

3. No additional evidence has been requested by the writer.

4. An independent decision based on the intensive review of and reflection upon the materials presented during the LEA Due Process Hearing in the interest of Shannon Elaine Carter is set forth as follows:

SUMMARY OF FACTS

1. Shannon Elaine Carter is a female child who will be 16 years of age on October 24, 1985. She meets the State Department of Education's criteria for the condition of a learning disability. There also appears to be some depression and anxiety co-existing with the primary condition of a learning disability.

2. That the law requires that a free appropriate public education including special education and related services be provided to all handicapped children in a manner which meets their unique needs.

3. That the hearing officer did give due consideration to the testimony of all witnesses, although one might question the credibility of psychological testing administered by one neither licensed or state certificated to do so.

4. That the Florence County School District #4, Timmonsville, South Carolina is able to provide an appropriate education for Shannon Elain Carter.

STATEMENT OF THE DECISION

The central issue at hand is the fact that the law (P.L. 94-142) and interpretative regulations and court decision speak to both the issues of appropriate education and the delivery of education in the least restrictive environment.

Clearly, the concept of least restrictive environment is violated in the extreme by removing this child from her natural family so that she might attend an institution alleged to have a better program than the public school setting. Without question, the least restrictive environment for Shannon's education to occur would be in a rescurce room for learning disabled youngster in her home school district while she lives at home with her parents.

This leads, of course, to the basic issue of an appropriate education. There is little, if any, evidence to support the alleged claim that Shannon cannot receive an appropriate education in the LEA. In fact, the issue of an appropriate education seems to be peripheral to the question of diagnosis. One is lead to question any statements that unqualifiedly attribute cause and effect relationships to events and consequent emotional states. It is most likely that Shannon's emotional state has been affected negatively by her experience in school. However, the LEA has clearly evidenced its willingness to offer counseling in addition to the resource room for learning disabled students. The school district should adhere strictly to all due process requirements should the parents of Shannon Carter decide to enroll her in the public school system again so that she might receive a free appropriate public education in the least

restrictive environment. In short, the LEA is able to provide Shannon Elaine Carter a free appropriate public education.

The decision is binding on all parties unless an appeal (civil action) is initiated within ten (10) days following the receipt of this decision by the parties involved.

/s/Richard R. Ferrante
Richard R. Ferrante, Ph.D.
10-14-85

DUE PROCESS HEARING FOR SHANNON ELAINE CARTER

A due process hearing was held August 20, 1985, 2:00 p.m., at Timmonsville Area Vocational Center. The hearing was requested by the parents of Shannon Elaine Carter.

The purpose of the hearing was to determine if Florence County School District #4 was providing an adequate academic program for Shannon Elaine Carter. More specifically, the district was accused of:

1. refusing to provide an adequate academic program

2. developing an individualized educational program (IEP) that did not meet Shannon's needs in terms of instruction

3. not having a program to deal with Shannon's learning disability.

The following is a list of parties involved in the hearing and their position/relationship to Shannon:

Emory D. Carter--Father of Shannon
Elaine Carter--Mother of Shannon
James T. McBratney Jr.--Attorney for Mr. and Mrs. Carter
Linda M. Summer--Certified Social Worker
Lucy Davis--Educator
Dr. Joe Neely--Clinical Psychologist

Ray Hill--Educational Evaluator/Florence County School District #4
Ken Bailey--School Psychologist II
Avery Nelson--Principal/Timmonsville High School
Dr. Ernest Nicholson--Superintendent/ Florence County School District #4
Dr. William Latham--School Psychologist III
Ruth Jordan--English Teacher/Timmonsville High School
Bettye Hennigan--Mathematics Teacher/ Timmonsville High School
Pamela Farmer--Spanish Teacher/ Timmonsville High School
Lisa Free--Special Education Teacher/ Timmonsville High School
Gloria Nelson--Coordinator of Programs for the Handicapped/Florence County School District #4
Bruce Davis--Legal Counsel/Florence County School District #4

The following is a listing and brief description of each written item entered as evidence in this hearing:

EXHIBIT 1--COMPLAINANT--Linda Summer

An extensive report of Shannon's background, family relationships and problems encountered in school throughout her school career.

The first evaluation session indicated that Shannon may have a learning disability. Several instruments were used to determine the nature and degree of disability.

INSTRUMENTS USED

Weschler Intelligence Scale for Children-Revised
Bender Gestalt
Wide Range Achievement Test-1946 Edition
Gray Oral Reading Test-Form C
Written Composition
Family Drawing
Moody Problem Checklist

Ms. Summer's analysis of the test data indicated to her that Shannon has the following disorders:

1. Specific Language Disability (developmental dyslexia)

2. Attention Deficit Disorder

3. Emotional overlay manifested by anxiety and depression.

EXHIBIT 2--COMPLAINANT-Lucy Davis

Mrs. Lucy Davis evaluated Shannon on July 31, August 6, 8, 1985. She used the Stanford Achievement Test-Intermediate 2, Form E and Advanced, Form E.

The test results revealed a level of 2-3 years below her grade assignment in reading and other language skills, a memory deficit, inadequate math skills, and below level achievement in social sciences and science.

Mrs. Davis feels that the test results gives strong indications of some specific learning disabilities. She recommends that Shannon be placed in an educational

setting that can deal satisfactorily with her particular needs.

EXHIBIT 3--COMPLAINANT--Kenneth Bailey

Shannon Carter was referred to Kenneth Bailey for a psychoeducational evaluation because of a suspected learning disability. Mr. Bailey evaluated Shannon on April 13, 1985.

The following tests were administered:

Weschler Intelligence Scale for Children-Revised
Bender Visual Motor Gestalt
Wide Range Achievement Test
Peabody Individual Achievement Test
Key Math Diagnostic Arithmetic Test
Woodcock Reading Mastery Tests

Mr. Bailey's analysis of the test data revealed that Shannon meets the criteria for learning disability placement, using the standard deviation difference formula as recommended by the State Department of Education.

Mr. Bailey's opinion is that Shannon is evidencing the need for remediation of both math and reading skills, and counseling in order to overcome many of the defenses she is utilizing to cope with her academic problems.

EXHIBIT 4--COMPLAINANT-Dr. Joe Neely

Shannon was referred to Dr. Neely for psychological testing as part of an overall evaluation for

possible learning disability. Dr. Neely did the evaluations on July 30 and August 2, 1985.

Shannon was administered the following tests:

Weschler Intelligence Scale for Children-Revised
Wide Range Achievement Test, 1984 Revision
Gray Oral Reading Test
Bender-Gestalt
Thematic Apperception Test
Kinetic Family drawings
Draw-A-Person Test

The test results are similar to those reported on tests by previous evaluators.

Dr. Neely found that Shannon displays considerable disparity between her verbal and performance skills within the area of intelligence. He feels that emotionally, she displays a significant degree of depression and anxiety, and that Shannon displays a specific learning disability within the area of language and reading.

He recommends that Shannon be involved in a program of regular psychotherapy and enrolled in a program of intensive remediation.

EXHIBIT 5--COMPLAINANT-Dr. Allison Grant

Dr. Allison Grant performed an out-patient Adolescent Psychiatric Evaluation on Shannon, July 9, 1985. The evaluation was done in two forty-five minute sessions.

His evaluation of Shannon included reviewing the psychological test results of both Ms. Summer and Mr. Bailey. He states that Shannon clearly demonstrates evidence of anxiety about achievement/performance and demonstrates obvious anxiety and a decrease in verbal participation when comforted with new situations and/or testing situations. He feels this behavioral feature of Shannon's could be misinterpreted as passive-resistance.

Dr. Grant states that Shannon deserves a special education program that will aim at multi-sensory teaching, specifically for youngsters with a neurologically based learning disability. From information made available to him, Dr. Grant has determined that at present no such program is available in Florence County School District #4.

His report implies that Mr. Bailey may have limited understanding of neurologically based learning disabilities.

EXHIBIT 1--RESPONDENT-IEP

An individualized education program (IEP) for Shannon Elaine Carter which was written and signed by required participants on May 1, 1985.

EXHIBIT 2--RESPONDENT-Parent Authorization for Placement Form

Florence County School District # 4 Parent authorization for Placement Form #11 for Shannon Carter.

Documentation of parental consent for initial placement of Shannon E. Carter in a program providing special education and related services.

EXHIBIT 3--RESPONDENT--Test Results

CTBS results for Shannon E. Carter--April 1983
BSAP results for Shannon E. Carter--May 1984

These test results indicate her achievement and academic level of functioning.

EXHIBIT 4--RESPONDENT-Scholastic Record

Scholastic record for Shannon Carter complete with grades for the academic year 1984-85. (4½ units-earned)

EXHIBIT 5--RESPONDENT-Evaluation Summary and Staffing Report

Evaluation Summary and Staffing Report for Shannon Carter was conducted May 1, 1985.

The report includes:

Instruments administered
Summary of team evaluation
Committee's recommendation for placement and reevaluation
Reasons for recommendations
Signatures (required)

FINDINGS

The relevant evidence presented at this hearing is the test data and school records.

Shannon was tested by five (5) evaluators, and they all agreed that she has a learning disability.

The IEP prepared for Shannon Elaine Carter on May 1, 1985 was complete. The parents wish to continue counseling from Ms. Summer rather than utilize services of the school guidance counselor.

The parent authorization for placement form was signed by Mrs. Elaine Carter on May 1, 1985 and she was provided with a document listing her rights with regards to evaluation and/or placement of her child into/out of programs for the handicapped.

The evaluation summary and staffing report was communicated to Mrs. Carter on May 1, 1985. The committee's recommendation for placement was accepted as evidenced by signatures of all committee members. The model accepted was itinerate.

The grade sheet shows that Shannon earned 4½ units during the 1984-85 school year. Grades improved considerably during the second semester of the 1984-85 school terms.

The IEP, approved at the May 1, 1985 meeting, was challenged at the hearing. Mrs. Carter and Ms. Summer are not satisfied with: 1) the district's goal of improving Shannon's total reading level from 5.4 grade level to the 5.8 grade level as measured by the

Woodcock reading Mastery Tests, 2) improving math skills from the 6.4 grade equivalent to the 6.8 grade equivalent as measured by the Key Math Diagnostic Test, by June 1986.

DECISION AND RATIONALE

I find Florence County School District #4 innocent of the charges brought against it by Mr. and Mrs. Emory Carter.

My decision is limited to the specific complaints which were the issues to be resolved.

ISSUE 1.

Florence County School District #4 refused to provide an adequate program for Shannon Carter.

RESPONSE 1.

Mrs. Nelson responded to a request for an evaluation of Shannon. The evaluation was done by Kenneth Bailey on April 13, 1985. The results revealed that Shannon met the criteria for learning disability placement. On May 1, 1985, Mrs. Nelson completed an Evaluation Summary and Staffing Report, held the IEP conference with the appropriate committee and completed the Parent Authorization for Placement Form.

The new program was implemented on May 2, 1985.

ISSUE 2.

The IEP and the amount of instruction provided by the school district in the 1984-85 school year was inadequate to meet Shannon's needs.

RESPONSE 2.

The IEP was presented and discussed at a meeting held on May 1, 1985. The document has the signature of Emory D. Carter, Elaine P. Carter, Linda M. Summer plus seven (7) members of the school district.

The following statement appears at the bottom of the document:

Note: Parents and school personnel may request another IEP meeting at any time they feel that a change is needed in the student's IEP.

ISSUE 3.

No program exists in Florence County School District #4 to deal with Shannon's learning disability.

RESPONSE 3.

Shannon Carter's learning disability was diagnosed as mild, in a majority of the evaluations. She was placed in the LD itinerate model.

There are programs available in the district that are more restrictive than the one chosen for Shannon. If test data or performance indicated a need for a change in placement, a reevaluation would be done and a change in placement could take place.

Respectfully submitted,

/s/ Heyward S. Rosemond
Heyward S. Rosemond,
Hearing Officer

APPEAL PROCEDURES

If you disagree with my decision, you may appeal to the State Education Agency (SEA) within ten (10) calendar days after receiving this notice; Otherwise my decision is binding.

Parties appealing my decision must submit the appeal in writing to the Office of Programs for the Handicapped, State Department of Education. Where parents are unable to communicate through written correspondence, a person representing the parents, or a member of the LEA staff, as determined by the Superintendent, may prepare the appeal in behalf of the parents. Parties submitting an appeal to the SEA must insure that the appeal is in writing and it includes the following:

1. An electronic verbatim or written transcript of the LEA hearing.

2. A statement of the decision following the LEA hearing, the specific points being appealed and copies of all items entered as evidence. The appellant may also include written argument.

Any party filing an appeal must notify the other party of such and provide a copy of the appeal, including written arguments to the other party.

STATUTORY AND REGULATORY PROVISIONS

20 U.S.C. § 1401. Definitions

(a) As used in this chapter --

* * *

(18) The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

* * *

(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include--

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting,

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

20 U.S.C. § 1412. Eligibility requirements

In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

20 U.S.C. § 1413. State plans

(a) **Requisite features.** Any State meeting the eligibility requirements set forth in section 1412 and desiring to participate in the program under this part shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall--

* * *

(4) set forth policies and procedures to assure -

* * *

(B) that--

(i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this part) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State; and

(ii) in all such instances, the State educational agency shall determine whether such schools and

facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

20 U.S.C. § 1415. Procedural Safeguards

(e) Civil action; jurisdiction

(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

34 C.F.R. Ch. 111. Office of Special Education and Rehabilitation Services, Education

§ 300.349 Individualized education program--accountability.

Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

§ 300.401 Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under §§ 300.340-300.349 of subpart C;

(2) At no cost to the parents; and

(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.

§ 300.347 Private school placements.

(a) *Developing individualized education programs.*

(1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with § 300.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized educational program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs.*

(1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility*. Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

S.C. Code Regs. 43-62K

The following requirements must be satisfied for any specific area of exceptionality with the exception of Generic Special Education:

1. Bachelor's Degree.
2. Professional Certificate at the Elementary, Middle School or Secondary level.
3. Minimum qualifying score on South Carolina State Board of Education required examination.
4. Specialized Preparation--21 semester hours as specified.

a. Educable Mentally Handicapped	Semester Hours
(1) Human Growth and Development or Equivalent	3
(2) Teaching of Reading	3
(3) Introduction or Psychology of Exceptional Children	3
(4) Nature or Psychology of the Mentally Handicapped	3
(5) Educational Procedures for the Mentally Handicapped	3
(6) Elective courses (two courses to be elected from the following:)	6
Art Education	
Nature of Emotionally Disturbed	
Principles of Speech Correction	

Educational Assessment	
Physical Education and Recreation for the Exceptional Child	
Teaching of Language Arts for the Mentally Handicapped	
Teaching of Mathematics for the Mentally Handicapped	
Introduction to Rehabilitation and Community Services	
Theories of Learning	
Educational Procedures for Culturally and/or Educationally Handicapped Youth	
Practicum in Instruction of Exceptional Children	
Learning Disabilities	
Psychological Aspects of Disability	

b. Emotionally Handicapped	Semester Hours
(1) Human Growth and Development or Equivalent	3
(2) Teaching of Reading	3
(3) Nature of Emotionally Handicapped	3
(4) Educational Procedures for Emotionally Handicapped	3
(5) Practicum in Instruction for the Emotionally Handicapped	3
(6) Elective courses (two courses to be elected from the following:)	6
Introduction to Exceptional Children Educational Assessment	
Remedial Reading	
Theories of Personality	
Teaching of Mathematics	

Introduction to Rehabilitation and Community Services
Educational Procedures for Culturally and/or Educationally Handicapped Youth
Educational Psychology
Physical Education and Recreation for the Elementary School Child
Learning Disabilities

c. Generic Special Education

(1) Bachelor's Degree.

(2) Professional Certificate in either Educable Mentally Handicapped, Emotionally Handicapped or Learning Disabilities.

(3) Minimum qualifying score on South Carolina State Board of Education required examination.

(4) Complete a NASDTEC, NCATE, or State Board of Education approved program for initial certification in Generic Special Education.

OR

(a) If certified in one area listed above, must present three semester hours of coursework or practicum in each of the two remaining areas relative to characteristics or teaching procedures;

OR

Six semester hours in generic special education coursework to include nature, teaching procedures, career education, or assessment of the mildly handicapped;

OR

A combination of three semester hours of categorical and three semester hours of generic special education coursework.

(b) If certified in two of the areas listed above, must present three semester hours of coursework or practicum in the remaining area relative to characteristics or teaching procedures;

OR

Three semester hours in generic special education coursework to include nature, teaching procedures, career education, or assessment of the mildly handicapped.

d. Hearing Handicapped

	Semester Hours
(1) Human Growth and Development or Equivalent	3
(2) Teaching of Reading	3
(3) Methods of Teaching Speech Reading	3
(4) Psychology of Hearing Handicapped	3
(5) Teaching of Language to Hearing Handicapped	3
(6) Elective courses (two courses to be elected from the following:)	6
Introduction to Exceptional Children	
Educational Assessment	
Anatomy of the Auditory and Speech Mechanism	
History of Education and Guidance for the Hearing Impaired	

Audiology, Hearing Aids, and Auditory Training
Methods of Teaching Elementary School Subjects
Principles of Speech Correction
Physical Education and Recreation for the Exceptional Child
Nature of Emotionally Disturbed
Learning Disabilitites
Remedial Reading
Practicum in Instruction of the Exceptional Child
Introduction to Rehabilitation and Community Services
Educational Psychology

e. Learning Disabilities

		Semester Hours
(1)	Human Growth and Development or Equivalent	3
(2)	Teaching of Reading	3
(3)	Characteristics of Learning Disabilities	3
(4)	Educational Procedures for Learning Disabilities	3
(5)	Practicum in Instruction with Learning Disabilities	3
(6)	Elective courses (two courses to be elected from the following:)	6

Educational Assessment
Introduction to Exceptional Children
Remedial Reading
Practicum in Instruction of Learning Disabilities
Nature of Emotionally Handicapped
Language Arts

Introduction to Rehabilitation and Community Services
Educational Procedures for Culturally and/or Educationally Handicapped Youth
Theories of Learning
Educational Psychology
Physical Education and Recreation for the Exceptional Child
Physical Education and Recreation for the Elementary School Child

f. Orthopedically Handicapped

		Semester Hours
(1)	Human Growth and Development or Equivalent	3
(2)	Teaching of Reading	3
(3)	Nature of Crippling and Chronic Health Problems	3
(4)	Introduction to Exceptional Children	3
(5)	Practicum in Instruction for Orthopedically Handicapped	3
(6)	Elective courses (two courses to be elected from the following:)	6

Educational Assessment
Learning Disabilities
Principles of Speech Correction
Introduction to Rehabilitation and Community Services
The Nature of Emotional Disturbance
Educational Procedures for Culturally and/or Educationally Handicapped Youth
Educational Procedures for Orthopedically Handicapped
Remedial Reading

Educational Procedures for Mentally Handicapped
Educational Psychology
Psychological Aspects of Disability

g. Trainable Mentally Handicapped

		Semester Hours
(1)	Human Growth and Development or Equivalent	3
(2)	Teaching of Reading	3
(3)	Introduction or Psychology of Exceptional Children	3
(4)	Nature or Psychology of the Mentally Handicapped	3
(5)	Educational Procedures for the Mentally Handicapped	3
(6)	Elective courses (two courses to be elected from the following:)	6

Art or Music for the Elementary School Child
Nature of Emotionally Disturbed
Principles of Speech Correction
Educational Assessment
Physical Education and Recreation for the Exceptional Child
Teaching of Language Arts for Handicapped
Teaching of Mathematics for Handicapped
Introduction to Rehabilitation and Community Services
Theories of Learning
Educational Procedures for Culturally and/or Educationally Handicapped Youth
Practicum in Instruction of Exceptional Children

Learning Disabilities
Psychological Aspects of Disability

h. Visually Handicapped

		Semester Hours
(1)	Human Growth and Development or Equivalent	3
(2)	Teaching of Reading	3
(3)	Nature of Visually Handicapped	3
(4)	Educational Procedures for Visually Handicapped	3
(5)	Introduction to Exceptional Children	3
(6)	Braille -- Reading and Writing	3
(7)	Orientation and Mobility for the Classroom Teacher	3
(8)	Practicum in Instruction of the Visually Handicapped Child	3
(9)	Anatomy, Physiology, and Function of the Eye	3

(Practicum may be removed with one year of successful teaching experience with visually handicapped children.)

S.C. Code Regs. 43-243(E)

7. Whenever handicapped children are placed in private schools by the SEA/LEA, such private schools must be in compliance with the standards of the SEA/LEA. Private schools located within South Carolina shall meet standards that apply to the SEA/LEA in South Carolina. When the SEA/LEA places a handicapped child in a private school in another State, that school must meet the standards that apply to the SEA/LEA of the State in which the private school is located.

Minimal standards for all children including the handicapped receiving public education in South Carolina are outlined in the Defined Minimum Program for South Carolina School Districts (DMP). Private schools located within South Carolina in which handicapped children have been duly placed by LEAs, must be in comformity with the standards set forth in the DMP. In order to insure that such handicapped children duly placed in private schools by LEAs have all the rights they would have if educated in a public school, the SEA shall require that the private school officials sign a contractual agreement with the LEA/SEA insuring compliance with the following requirements:

a. That the handicapped child be evaluated in accordance with the Procedures for Survey, Screening, Evaluation, Placement and Dismissal of Children Into/Out of Programs for the Handicapped approved by the State Board of Education on March 12, 1976.

b. That the handicapped child be accorded all the rights afforded by P.L. 94-142 including the right to confidentiality, procedural safeguards and non-discriminatory assessment.

c. That the local education agency shall have responsibility for, but assisted by the school in the development of a written individualized education program and that the individualized education program will be revised at least annually.

d. That the handicapped child be educated in the least restrictive environment appropriate to implement the child's individualized education

program without reducing the quality of services required.

Defined Minimum Program for South Carolina School Districts (1986)

Grades 9-12

I. Qualifications of School Personnel

• • •

C. Teacher

A teacher is required to hold at least the bachelor's degree, or a degree equivalent, from an approved college or university and be certified to teach the subjects assigned. Trade and industrial teachers shall hold a trade certificate.

Exceptions to this standard are:

1. A teacher who is assigned to teach a subject in a majority of class periods in areas for which he is not properly certified must have completed 12 semester hours of credit in the subject area assigned. Annually, by October 15, the district superintendent shall request an out-of-field permit from the Office of Teacher Education and Certification for each teacher not properly certified. The teacher must earn six semester hours toward proper certification each year for renewal of the out-of-field permit.

2. A teacher who is teaching a majority of classes in areas in which he is properly certified may be

given teaching assignments in subject areas for which he is not properly certified if the teacher has completed the minimum of six semester hours of college credit in the subject areas assigned.

3. Annually, by October 15, the district superintendent shall request an out-of-field permit from the Office of Teacher Education and Certification for each person scheduled to teach at least half-time out of his area of certification.

4. A teacher of handicapped pupils in the resource or itinerant model shall be certified, or have a permit in the area of handicapping condition in which the majority of students are classified, or be certified in one area of handicapping condition in which the teacher is teaching and successfully complete six semester hours annually toward certification in the area in which the majority of students are classified. Pupils participating in self-contained programs shall be of the same category of disability. The teacher must be certified or hold a permit in the area of handicapping condition in which the majority of the pupils are served.

A school shall not have more than 10 percent of classroom instruction time taught by teachers who are not properly certified (for example: a teacher on a permit or assignment in a subject area for which he is not properly certified). The 10 percent is calculated by dividing the total time of teachers teaching out of their area of certification by the total instructional time. Exception: Resource teachers are not counted in computation.

(2)

No. 91-1523

Supreme Court, U.S.
FILED
APR 29 1992
OFFICE OF THE CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR,
ERNEST K. NICHOLSON, SUPERINTENDENT,
IN HIS OFFICIAL CAPACITY,
AND SCHOOL BOARD MEMBERS BENNIE ANDERSON,
MONROE FRIDAY, JACK ODOM, ELRITA BACOTE,
T.R. GREEN, JAMES W. HICKS,
IN THEIR OFFICIAL CAPACITY,
PETITIONERS,

v.

SHANNON CARTER,
BY AND THROUGH HER FATHER AND NEXT FRIEND,
EMORY CARTER,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

NANCY MCCORMICK
SOUTH CAROLINA PROTECTION
& ADVOCACY SYSTEM FOR
THE HANDICAPPED
Suite 208
3710 Landmark Drive
Columbia, SC 29204
(803) 782-0639

KATHLEEN B. BOUNDY*
EILEEN L. ORDOVER
CENTER FOR LAW
AND EDUCATION
955 Massachusetts Avenue
Cambridge, MA 02139
(617) 876-6611
**Counsel of Record*

Counsel for Respondents

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Whether the parents of a child with a severe learning disability, who was denied a free appropriate public education, are entitled to reimbursement under the Individuals with Disabilities Education Act when they unilaterally placed her in a private placement that provided her with an appropriate education, i.e., one that is, consistent with *Board of Education v. Rowley*, reasonably calculated to enable her to receive educational benefits.

2. Whether a federal court may, after reviewing the administrative decision and based on a preponderance of the evidence, exercise its independent right of judicial review to find that a proposed individualized education program [IEP] which contains wholly inadequate long-term goals is not reasonably calculated to enable a child with a severe learning disability to receive educational benefits.

Table of Contents

Statement of the Case 2

Reasons for Denying the Writ 6

I. The Petition Does Not Raise an Important, Unsettled Issue of Federal Law 8

A. The Petitioner School District Failed to Provide Respondent Student a Free Appropriate Public Education 9

1. The record supports the finding that Petitioners' Proposed IEP was not reasonably calculated to provide Shannon Carter with an appropriate education 9

2. The appellate court did not exceed its authority under section 1415(e)(2) by focussing on the limited annual goals of the proposed IEP in assessing its appropriateness 13

B. Trident Academy Was a Proper Placement Under IDEA and Provided Shannon Carter With an Appropriate Education 14

II. The Appellate Court Ruling is Consistent With the Intent of the Statute, The Legislative History, and the Plain Language of Section 1413(a)(4) 16

III. There Are No Conflicts Which Warrant the Granting of the Petition, and Review by this Court Would be Premature in Any Event 18

A. *Tucker* Is Not Applicable to States With Private School Approval Mechanisms Like South Carolina's 20

1. *Tucker* by its terms assumes an approval mechanism like New York's 20

2. Construing *Tucker* to require state approval in states like South Carolina produces absurd results 24

B. *Tucker* Did Not Hold that Reimbursement Rights Extend Only to Placements in Private Schools That Meet the Four-Pronged Statutory Definition of "Free Appropriate Public Education" 25

C. *Tucker* Is Grounded On An Interpretation of Fourth Circuit Precedent Rejected By the Fourth Circuit in the Decision Below 26

D. Review of Any Perceived Conflict Would Be Premature at This Time 27

Conclusion 30

Appendix 1a

Table of Authorities Cited

Cases

Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986) 9, 13, 18, 19

Antkowiak v. Ambach, 838 F.2d 635 (2nd Cir.), *cert. denied*, 488 U.S. (1988) 21, 26

Barnett v. Fairfax, 927 F. 2d 146 (4th Cir.), *cert. denied*, ___U.S.___, 112 S.Ct. 175 (1991) 29

Battle v. Commonwealth of Pennsylvania, 629 F.2d 269 (3rd Cir. 1980), *cert. denied sub nom., Scanlon v. Battle*, 452 U.S. 968 (1981) 13

Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982) 7, 9, 12, 15

Carrington v. Commissioner of Education, 404 Mass. 290, 535 N.E.2d 212 (1989) 19

Clevenger v. Oak Ridge School Board, 744 F.2d 514 (6th Cir. 1984) 29

East Windsor v. Diamond, 808 F.2d 987 (3rd Cir. 1986) 13

Garland Independent School District v. Wilks, 657 F. Supp. 1163 (N.D. Tex. 1987) 19

Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985) 9, 13

Honig v. Doe, 484 U.S. 305 (1988) 13, 18

In re Smith, 926 F.2d 1027 (11th Cir. 1991) 29

Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987) 26

Spielberg v. Henrico County Public Schools, 853 F.2d 256 (4th Cir. 1988) 9

Tice v. Botetourt County School Board, 908 F.2d 1200 (4th Cir. 1990) 15

Town of Burlington v. Department of Education, 471 U.S. 359 (1985) 7, 8, 15, 19

Town of Burlington v. Department of Education, 736 F.2d 773 (1st Cir. 1984) 28

Tucker v. Bay Shore Union Free School District, 873 F.2d 563 (2nd Cir. 1989) 19, 21, 22, 25, 26

Statutes

Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* 6

20 U.S.C. §1401(a)(18) 25
20 U.S.C. §1401(a)(18)(A) 25, 28
20 U.S.C. §1401(a)(18)(B) 22
20 U.S.C. §1401(a)(18)(C) 25

20 U.S.C. §1401(a)(18)(D) 25, 28
20 U.S.C. §1401(a)(20) 14, 25, 28

20 U.S.C. §1412(5)(B) 16
20 U.S.C. §1412(6) 24, 28

20 U.S.C. §1413(a)(4)(B) 7, 16, 17, 18

20 U.S.C. §1414(a)(5) 25
20 U.S.C. §1414(d)(1) 28

20 U.S.C. §1415(e)(2) 8, 13
20 U.S.C. §1415(e)(3) 17, 18

S.C. Code §59-33-50 16

Rules and Regulations

34 C.F.R. §300.347 16
34 C.F.R. §§300.400-300.403 16
34 C.F.R. §300.541 3
34 C.F.R. §§300.550-300.551 16

34 C.F.R. part 300 App. C., para. 36(a) 14
34 C.F.R. part 300 App. C., para. 36(c) 14
34 C.F.R. part 300 App. C., para. 38 14
34 C.F.R. part 300 App. C., para. 39 14
34 C.F.R. part 300 App. C., para. 40 14

S.C. Code R. 43-243 10
S.C. Code R. 43-243(E) 23
S.C. Code R. 43-243(E)(7) 16, 17, 24

S.C. Dept. of Educ., Defined Minimum Program for South Carolina School Districts (1986) 6, 24

Other Authorities

S.Rep. No. 168, 94th Cong. 1st Sess. 32, 50, reprinted in 1975 U.S. Code Cong. & Admin. News 1425 16

No. 91-1523

In the
Supreme Court of the United States

October Term, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion and order of the United States Court of Appeals for the Fourth Circuit in this case. That opinion

and order are reported at 950 F.2d 156 (4th Cir. 1991).[1]

STATEMENT OF THE CASE

FACTS

Respondent Shannon Carter experienced academic difficulties from an early age. [JA 47; JA 358-59; JA 388]. From the time she enrolled in the seventh grade in petitioner Florence County School District Four in 1982, she experienced continued academic failure. [JA 358-59, JA 361]. Mrs. Carter requested that Shannon be tested after her first semester in the public school because she did not think her daughter could read. [JA 49]. Mrs. Carter's oldest child, a son who also attended public school in the petitioner district, had been diagnosed as having developmental dyslexia. [JA 358-59; JA 361; JA 385].

In February 1983, an educational evaluator for the district, Cecil Ray Hill, who was not certified as a school psychologist or qualified to assess students with learning disabilities [JA 72], tested Shannon. [JA 65]. He testified that he had no knowledge at the time as to how Shannon was performing in the classroom. [JA 71]. Although Mr. Hill was unable to locate any records of Shannon's test results at the time of trial [JA 66], he recollected that he administered to Shannon an IQ test and an achievement test, "more likely than not" the Wechsler Intelligence Scale for Children, Revised [WISC-R] and the Peabody Individual

[1] The opinion of the Court of Appeals is reprinted in the Appendix to petitioners' Petition for Writ of Certiorari, which is cited herein as "PA __." The unreported order and decision of the district court is also reprinted in the Appendix to the Petition, as well as in the Joint Appendix filed with the Court of Appeals and lodged by petitioners with the clerk of this Court. The Joint Appendix is cited as "JA __." The Petition for Certiorari is cited as "Pet. __."

Achievement Test [PIAT]. [JA 66]. He recalled that Shannon did not qualify as learning disabled because there was not a significant discrepancy between her slightly above average IQ and slightly below average achievement test results. [JA 66-67]. After this evaluation, which did not comply with the requirements of 34 C.F.R. §300.541, [JA 70, 78], Shannon's parents were told that their daughter could do the work if she wanted to, that she lacked motivation. [JA 49]. During the next two years Shannon continued to experience academic failure and was punished at home for poor grades and treated by her family as if she were lazy and unmotivated. [JA 49]. In the spring of 1985, Mrs. Carter again requested that Shannon be tested, for she had discovered that her daughter was failing most of her courses and had changed her first semester failing grades on her report card. Mrs. Carter was also very concerned that Shannon was manifesting symptoms of serious depression. [JA 138-39].

In April 1985, when Shannon was in grade 9, a certified school psychologist finally diagnosed her as having a learning disability. [JA 361-63]. Her evaluation indicated a verbal IQ of 81 and a performance IQ of 117, with various subtests indicating reading ability levels from 4.7 grade level to a 6.8 level. [JA 362, 364]. Despite these findings attesting to the presence of a severe learning disability, the school evaluation described her disability as "one which is felt to have been acquired and fostered over a period of time in which [Shannon] did not apply the skills which she seems to possess." [JA 363]. The individualized education program ("IEP"), which was proffered by the school system with its very limited program of less than 3 hours of special instruction per week, limited expectations and unacceptably limited long-term goals over more than a full school year [JA 158, 160-61; JA 226; JA 336-37; JA 366], similarly suggested that those who had prepared it did not share an understanding or perception that this child had a severe disability and had been denied years of

specialized instruction and related services which might have enabled her to compensate for her learning disability and to bridge the gap with her non-disabled peers. [JA 147-48; JA 347; JA 366]. At the May 1, 1985 IEP meeting, Mr. Carter indicated that he wanted his daughter to read on a 12th grade level when she was graduated from high school. [JA 118-19]. Mr. and Mrs. Carter were accompanied to the IEP meeting of May 1, 1985, by Linda Summers, a psychiatric social worker who had been privately engaged by Mr. Carter the prior February to provide counseling services to help Shannon cope with serious depression. In her professional capacity and as the individual who initially identified Shannon's disability [JA 386], she came to the IEP meeting to offer input into the development of a program that might enable Shannon to receive educational benefits. [JA 366]. Although she admonished the school district personnel not to put undue pressure on Shannon, whom the district had deprived of an appropriate education for more than three years, Ms. Summers very explicitly stated that she was not an educator. [JA 119].

Dr. Allison Grant, an independent child and adolescent psychiatrist, who evaluated Shannon in August that year, described her depressive symptoms as including "depressed mood, feelings of hopelessness and pessimism (especially around academics/school areas) and suicidal ruminations (contemplating cutting her wrist)...", which were present for a one and a half to two year period prior to the evaluation by Ms. Summer in February 1985. [JA 386; JA 223-25]. Specifically his written evaluation states that Shannon was unable to utilize some of the skill areas that she possesses not because of any "lack of motivation on her part or a result of passive-resistive and manipulative behaviors, but more a result of the failures of the [school] system." [JA 388-89]. "The failure of detection and needed academic approach", according to Dr. Grant's evaluation, "clearly interfered not only with her learning/academic progress but was the major (and

probably sole) factor ... for the significant depression that she has experienced...as well as the family conflicts..." [JA 388]. Shannon's learning disability was compounded by a belatedly diagnosed attention deficit disorder. [JA 149-50; JA 180-81]. Her learning disability was so severe that in the fall of 1985, she was described by a learning disability specialist as "functionally illiterate." [JA 173, 176]. She needed an intensive multi-sensory teaching program designed for children with neurologically based learning disabilities; this self contained program would provide a low student-teacher ratio, small classes, intense remediation in reading and written expression. [JA 173, 175; JA 187-89, 191; JA 388]. No intensive self contained program for students with neurologically based learning disabilities was available at Timmonsville High School [JA 85; 125, 133-34, 136; JA 148; JA 354-55]; nor did the petitioner school district ever offer to develop such a program to meet Shannon's educational needs. [JA 136; JA 148; JA 191; JA 240].

Faced with Petitioner's refusal to provide an appropriate IEP, respondent's parents enrolled her in Trident Academy, a private school specializing in the education of children with learning disabilities [JA 167-68; PA 28a] and fully accredited by the Southern Association of Colleges and Schools and the Palmetto Association of Independent Schools. [JA 208; PA 28a]. South Carolina school districts have placed students at Trident pursuant to IDEA on at least three occasions, as have districts in other states. [JA 209; PA 28a]. The South Carolina Department of Education has never disapproved an application for placement at Trident. [JA 210; PA 28a].[2]

---

[2] Under South Carolina's regulatory scheme, private schools are approved by the Department of Education for special education placements on a case-by-case basis, in reference to a particular child at the behest of his or her local school district. See discussion *infra* at 22-24.

Trident set student goals on a quarterly basis, formulating them in much the same language as IEPs use. [JA 200; PA 11a]. During the first of Shannon's two years at Trident, her program included one forty-five minute period per day of one-to-one or two-to-one language development instruction [JA 169] with an uncertified teacher. [JA 195].[3] The district court's appointed expert concluded that Trident "did a very effective job" in teaching Shannon. [JA 330; PA 29a; see also JA 343-45].

REASONS FOR DENYING THE WRIT

This Court should deny *certiorari*, first, because the decision below presents no important issue which does not turn on the facts and particular circumstances of this case. The only issue presented here is whether the Fourth Circuit consistently applied this Court's prior decision granting "appropriate" relief in the form of retroactive reimbursement to parents who unilaterally placed their child in a private placement, proper under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§1400 *et seq.*, when the IEP in the public school was inappropriate. See *School Committee of the Town of*

[3] During the time Shannon attended Trident Academy, two of its faculty members were uncertified. [JA 195]. It is unclear from the record whether they lacked any teacher certification at all, whether they were certified elsewhere but not by South Carolina, or whether they were certified but not in special education. [See JA 195-96 (testimony of Margaret Mitchell, agreeing with statement that two Trident faculty members "are not certified teachers") and JA 314 (testimony of John Richardson, answering "yes" when asked if he had heard testimony that all but two of the teachers at Trident "are certificated in special education")]. State law permits public schools to have up to 10% of classroom instruction time taught by teachers teaching out of their area of certification. See S.C. Dept. of Educ., Defined Minimum Program for South Carolina School Districts (1986) at 53, reprinted at PA 71a-72a.

Burlington v. Department of Education, 471 U.S. 359 (1985). The Fourth Circuit concluded that when it is necessary for parents to place their child in a private school in order to obtain an appropriate education, a proper placement under the Act is one that provides the eligible student an appropriate education, i.e., one that is reasonably calculated to enable her to benefit from her special education program. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07 (1982). Resolution of this issue required the lower courts to analyze the plain language of the statute, specifically 20 U.S.C §1413(a)(4)(B), and exercise remedial discretion in the context of South Carolina's statutory scheme for ensuring the provision of free appropriate public education to all students with disabilities. Any determination by this Court as to whether the Fourth Circuit abused that discretion in this case will furnish minimal guidance to other federal courts addressing this issue in the context of different state statutory schemes.

Second, no actual conflict exists between the decision below and any decision by this Court or of any other Circuit Court of Appeals. The decision by the Fourth Circuit is distinguishable from that of the Second Circuit which previously exercised judicial remedial discretion peculiar to New York's system for approving private schools for special education placement and, in so doing, relied upon an interpretation of Fourth Circuit precedent repudiated in the decision below. The only other Court of Appeals decision addressing issues similar to those decided below, rendered by the Fifth Circuit, supports the Fourth Circuit result.

I. THE PETITION DOES NOT RAISE AN IMPORTANT, UNSETTLED ISSUE OF FEDERAL LAW.

The petitioner, Florence County School District Four, asks this Court to see this case as raising an important question about the remedial authority of the lower courts to expand the duty of public funding for private education beyond that required by IDEA. This is a non-issue. In *Burlington*, *supra*, this Court established the standards to be applied in considering when tuition reimbursement is an "appropriate" remedy under 20 U.S.C. §1415(e)(2). These principles control the disposition of the instant case.

This Court interpreted the language of section 1415(e)(2) directing a court to "grant such relief as [it] determines is appropriate" to include "the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP is proper under the Act." 471 U.S. at 369. Accordingly, parents are entitled to reimbursement for private school tuition costs if a court finds that the public school failed to provide a student with a disability a free appropriate public education, and if the private placement selected by the parents in fact provided an appropriate education to the student. This Court reasoned that parents, who choose to bear the risk of paying for private education when they believe the IEP proposed by the local public school is inappropriate for their child, should receive more than "an empty victory" if their decision is subsequently vindicated. *Id.* at 370. Indeed, the child's right to a free appropriate public education and the parent's right to participate fully in the development of a proper IEP would be seriously compromised were these private education related expenses not reimbursable. *Id.* at

370.[4]

In this case the Fourth Circuit affirmed the district court's reversal of the administrative decision finding that the petitioner school district's IEP provided respondent-student a free appropriate public education. The trial court properly reached an independent decision based on a preponderance of the evidence, *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258 (4th Cir. 1988), after reviewing the administrative decision and record, and hearing testimony from eighteen witnesses, including an independent court appointed expert.

A. *The Petitioner School District Failed to Provide Respondent Student a Free Appropriate Public Education.*

1. *The record supports the finding that Petitioners' proposed IEP was not reasonably calculated to provide Shannon Carter an appropriate education.*

In determining that the petitioner school district failed to provide respondent Shannon Carter with a free appropriate public education the lower courts were guided by the two-fold inquiry set forth in *Rowley*. See 458 U.S. at 206-07. While finding no serious procedural non-compliance with IDEA [PA 35a], *see Hall v. Vance County Board of Education*, 774 F.2d 629, 635 (4th Cir. 1985), the courts found that Shannon's 1985 IEP, which was developed when she was 15 years old and enrolled in grade 9 in the Florence County School District Four system, was not "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. [PA 8a; JA 24, 32; PA 27a, 36a]. Substantial testimony and other

---

[4] *See e.g., Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1161 (5th Cir. 1986).

evidence in the record support this finding.

Despite Shannon's being described as having a severe learning disability [JA 182, 184-85, 187; JA 226, 230, 338; JA 362, 364] with significant emotional overlay, manifested by depression, feelings of low self-worth and self-esteem, and suicidal thoughts [JA 139, 147, 154; JA 223-25, 385-87; JA 360], the IEP proposed and implemented by petitioner school district in early May 1985, called for Shannon to receive only three periods of learning disability itinerant classes[5] per week or less than three hours of special education. [JA 366]. The district court found that this program was inadequate to allow Shannon to "receive passing marks and advance from grade to grade." [JA 32, PA 36a]. This finding was based on a preponderance of the evidence presented through testimony at trial by Ms. Mitchell, who described Shannon upon her enrollment at Trident Academy in September 1985 as "functionally illiterate," [JA 176] Dr. Ward, [JA 186-88] and Dr. Grant [JA 226-28]. Court appointed expert, Dr. Nagle, also testified that Shannon would never have been able to achieve the level of academic progress [three grade level equivalents in three years] she subsequently attained at Trident Academy had she continued under the petitioner school district's IEP. [JA 326, 331-32].

The long-range goals in reading in the 1985-86 IEP [JA 365-377] consisted of four months' progress, from a reading grade level of fifth grade fourth month [5.4] to fifth grade, eighth month [5.8] over the course of the entire

[5] The South Carolina Board of Education Regulations 43-243, at page 144 explain the difference between an itinerant program and resource class as follows: In an itinerant program the specialist will provide continual ongoing services to handicapped pupils and teachers taught in regular classroom settings. A resource room program shall involve pupils who will remain in regular classrooms for the major part of the day and will be scheduled into the resource room for one or more periods of individualized instruction contingent on pupil's needs. [See PA 26a; JA 23, n.7].

school year. [JA 366]. The IEP goals for progress in math were also limited to four months' progress over the course of a year. [JA 366]. The trial court properly concluded, relying in part, on the expert testimony of Dr. Grant, Dr. Ward and Ms. Mitchell [JA 226-27; JA 186-87; JA 176] that these very limited "goals were wholly inadequate," [PA 27a; JA 24] particularly for a 15 year old student of above average intelligence, [JA 186-87; JA 362, 364] who despite years of academic failure, was not identified as having a severe learning disability by the school district until the spring of 1985. [JA 361-64]. Moreover, the court noted, even assuming these limited goals were met, Shannon would continue to "fall behind her classmates at an alarming rate." [JA 32; PA 36a]. On appeal the Fourth Circuit affirmed the district court's conclusion that the petitioner school district's itinerant program failed to provide Shannon an appropriate education. [PA 8a]. The appellate court determined that the district court's finding a goal of four months' progress over a period of more than a year was "rather modest" and "unlikely to permit her to advance from grade to grade with passing marks" was not clearly erroneous. [PA 8a].

Petitioners' contention that there is substantial evidence that Shannon made significant educational improvement during the limited period from May through June 1985, when the IEP at issue was actually being implemented [Pet. at 8] is deliberately misleading. Shannon's cumulative grades for the 1984-85 school year were 3 D's, 1 C, and she withdrew from a pre-algebra class that she was failing during her last quarter. [JA 53-54].[6]

[6] During the period from May to June 1985, when petitioner's IEP was being implemented, Shannon Carter was receiving private tutoring at her parents' expense one to two times per week and counseling from a psychiatric social worker employed by her parents; she had also been placed on a daily dosage of Ritalin for her belatedly diagnosed attention deficit disorder [JA 149-50; JA 297; JA 386, 388].

The trial court properly found, despite this so-called "improvement," that the proposed IEP did not provide Shannon with an appropriate public education reasonably calculated to enable her to receive educational benefits. [PA 36a; JA 32]. *Rowley* recognized that no single substantive standard can describe how much educational benefit is sufficient to satisfy the Act's requirement of a "free appropriate education", but stated that the benefit must be "meaningful," 458 U.S. at 191-92, and "sufficient." *Id.* at 202. Therein, the Court found that a young student with a severe hearing impairment had made substantial, though not the maximum conceivable progress, as measured by concrete educational outcomes.[7] Subsequently in *Hall v. Vance County Board of Education*, the Fourth Circuit declined to overturn a district court ruling that discounted the promotions from grade to grade of a student with disabilities in light of a school district's policy favoring social promotions, and marginal improvements in the student's test scores based on independent evaluations. Rejecting any notion that the lower court was compelled "by a showing of minimal improvement on some test results" to find that the school

---

With these additional supportive services and after withdrawing from the pre-algebra course she was failing, Shannon passed three courses with C's, and received a grade of B in Physical Science. [JA 53]. The teacher, who was responsible for implementing the itinerant program for Shannon three periods per week from May to the end of the school year, testified that she was unaware that the student was being privately tutored during this period. She testified that this tutoring "could account for some" of the gain made in the last four weeks of the 1984-85 school year. [JA 297].

[7] The Court noted explicitly that the child, who was receiving considerable specialized instruction and related services, was performing above average in the regular classroom of a public school and advancing easily from grade to grade. *Rowley*, 458 U.S. at 185, 203.

district had provided the student with an "appropriate education," the appellate court stated, "[c]learly, Congress did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial." *Id.*, 774 F.2d at 636.[8] To the contrary, for a special education program to be considered appropriate, reasonable educational progress must be demonstrated. *East Windsor v. Diamond*, 808 F.2d 987, 991-992 (3rd Cir. 1986).

2. *The appellate court did not exceed its authority under Section 1415(e)(2) by focussing on the limited annual goals of the proposed IEP in assessing its appropriateness.*

Petitioners' argument that the appellate court exceeded its authority under section 1415(e)(2) by focussing on the goals of the proposed IEP in determining whether the IEP was, consistent with *Rowley*, reasonably calculated to enable the child to receive educational benefits, is clearly without merit. As this Court has recognized, the IEP is more than a blueprint for the education a child is to receive; it is "the center piece of the statute's education delivery system for disabled children." *Honig v.Doe*, 484 U.S. 305, 311 (1988). By definition, the written document must, *inter alia*, contain a statement of the student's present level of educational performance, including a

---

[8] Nor is the *Rowley* standard satisfied by evidence that the progress of a child with a disability, absent summer services, is *not* brought "to a virtual standstill." *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986)(citing *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269, 282 (3rd Cir. 1980)(Van Dusen, J. , concurring), *cert. denied sub nom., Scanlon v. Battle*, 452 U.S. 968 (1981).

description of the effect of the child's disability on academic and non-academic aspects of her performance, as well as a statement of annual goals and short term objectives. 20 U.S.C.§1401(a)(20), 34 C.F.R. Part 300, App. C. para.36(a). All problems noted in the statement of present educational performance are expected to have corresponding annual goals and short-term instructional objectives. 34 C.F.R. part 300, App. C, paras. 36(c), 38. Annual goals set forth what a student is expected to accomplish over a twelve month period; and short-term objectives should be measurable, intermediate steps toward accomplishing the corresponding annual goals. 34 C.F.R. part 300, App. C, paras. 38-39. Furthermore, goals and objectives set forth in the IEP "should focus on offsetting or reducing problems" associated with the child's disability which interfere with learning and educational performance. 34 C.F.R. part 300, App. C, para. 40.[9]

As the appellate court properly recognized, goals and objectives provide a basis for determining whether a child is progressing in and benefitting from her educational program, and thereby receiving an appropriate education. [PA 8a]; 34 C.F.R. part 300, App. C, para. 40. Accordingly, the appellate court properly affirmed the trial court's findings that the petitioner school district violated IDEA by failing to provide Shannon an appropriate education.

B. *Trident Academy Was a Proper Placement under the IDEA and Provided Shannon Carter an Appropriate Education.*

Under the principles established in *Burlington* by this Court the respondent, Mr. Carter, is entitled to

[9] "For example, if a learning disabled child is functioning several grades below the child's indicated ability in reading...the IEP goals and objectives would be directed toward (1) closing the gap between the child's indicated ability and current level of functioning,..." *Id.*

reimbursement for tuition and related costs associated with his daughter's receiving an appropriate education at Trident Academy. In finding that such placement was "proper under the Act," as required by *Burlington*, 471 U.S. at 369, the trial court relied on substantial undisputed testimony by respondent's witnesses [JA 190, 193-94; JA 228-29; JA 338-39; JA 343-45, 350-51, 388] as well as the court's own appointed expert, [JA 326, 328, 330, 341]. The Fourth Circuit in affirming this conclusion of law, explicitly held that the education provided to Shannon Carter was "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-207.[10]

The record reflects that Trident Academy is fully accredited by the Southern Association of Colleges and Schools, has accepted students under IDEA on numerous occasions, including at least three students placed by local school districts in South Carolina, and has never been disapproved as a special education placement by the South Carolina Department of Education. [JA 208-10]. Nevertheless, the trial court looked to actual test results obtained by its expert, Dr. Richard Nagle, who administered achievement tests [JA 318; JA 321; JA 324] to Shannon during the spring of 1988. The tests evidenced that Shannon had made substantial p[illegible]s, gaining, for example, more than three grade leve[illegible]uivalencies in reading comprehension in less than three school years at Trident Academy. [JA 323-325].

[10] The Court of Appeals, citing *Tice ex re. Tice V. Botetourt County School Board*, 908 F.2d 1200, 1208 (4th Cir. 1990), noted that this is the same standard by which the appropriateness of a public school IEP is assessed. [JA 17a].

II. THE APPELLATE COURT RULING IS CONSISTENT WITH THE INTENT OF THE STATUTE, THE LEGISLATIVE HISTORY, AND THE PLAIN LANGUAGE OF SECTION 1413(a)(4).

Despite protestations from the petitioner school district, there is nothing within the language of 20 U.S.C. §1413(a)(4)(B) that limits the availability of reimbursement as "appropriate relief" to only those parents who, having been forced by the public school's failure to provide their child with a free appropriate public education, succeed in obtaining an appropriate education for their child *in a private school that meets state education standards.* Nor, as the Fourth Circuit correctly realized is there any reference to the contrary in the legislative history of the Act, *see, e.g.*, S.Rep. No. 168, 94th Cong. 1st Sess. 32, 50, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1456, 1473. The statutory provision has no applicability to parental actions; it singularly applies to states and local school districts which must, as part of the continuum of placement alternatives they are required to maintain, *see* 20 U.S.C.§1412(5)(B); 34 C.F.R.§§300.550-300.551; S.C. Code § 59-33-50; S.C.Code R. 43-243(E)(7), provide private placements that meet state educational standards to children with disabilities whose needs cannot be met by their local educational agency and who will be referred and placed by the state or local educational agency. Consistent with this interpretation, both federal regulatory provisions and South Carolina law only apply state educational standards to private schools when the child is placed there by the state or local education agency. *See*, 34 C.F.R.§§300.400-300.403; 34 C.F.R. §300.347; S.C. Code §59-33-50 ("When a school district cannot...provid[e] for the education of its resident handicapped children because of insufficient numbers, the district may contract with other districts within the State or school systems or public or private institutions or agencies within or without the State

which maintain approved special educational facilities...."); S.C. Code Regs. 43-243(E)(7)(1987) ("Whenever handicapped children are placed in private schools by the SEA/LEA, such private schools must be in compliance with the standards of the SEA/LEA").

The plain language of 20 U.S.C. §1413(a)(4)(B) reads as follows:

> "...Each [State] plan shall-
> set forth policies and procedures to assure...that-
> (i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, *if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency* as a means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State; and
> ii) *in all such instances*, the State educational agency shali determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies..."

20 U.S.C. §1413(a)(4)(B)(West 1990 & Supp. 1991)(emphasis added).

In 1988, this Court relied on the plain language of IDEA and its legislative history to interpret section 1415(e)(3) [20 U.S.C.§1415(e)(3)], the so-called "stay-put" or "status quo" provision to bar school officials from "changing the educational placement" of a dangerous or disruptive student with emotional disabilities without his

parent's consent. *Honig v. Doe*, 484 U.S. at 323-28. This particular provision of the statute directs that a student with a disability "shall remain in [his/her] current educational placement..." pending completion of any review proceeding, unless the state or local education agency and the parent otherwise agree. Writing for the majority, Brennan, J. stated that the language of section 1415(e)(3) is unequivocal and contains no emergency exception for a dangerous or disruptive student based on the plain language of section 1415(e)(3) and the legislative history of the Act attesting to Congress' intent to educate all children with disabilities, including those with severe behavioral manifestations. *Id.* at 323-25.

As the language of §1415(e)(3) is *unequivocal* and contains no emergency exclusion provision, the language of §1413(a)(4)(B) similarly contains no restriction on Mr. Carter's right to reimbursement for costs associated with Trident Academy's having provided his daughter with the appropriate education to which she was entitled and was denied by the petitioner school district. As the Fourth Circuit so clearly understood, "[c]onditioning reimbursement under *Burlington* on state approval of the private school would undermine the values and policies the Act was enacted to further." [PA 19a].

III. THERE ARE NO CONFLICTS WHICH WARRANT THE GRANTING OF THE PETITION, AND REVIEW BY THIS COURT WOULD BE PREMATURE IN ANY EVENT.

Among the Courts of Appeals, only the Second and Fifth Circuits have addressed issues similar to those raised below. The Fifth Circuit ruling came in *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986), where the lower court, acting before this Court's decision in *Burlington*, had held that a Texas school district should have provided a child

with summer services over a period of two years, but did not explicitly find that the substitute services obtained by his parent "constituted the specific type of programming necessitated by the Act." 790 F.2d at 1161. Holding that reimbursement remains available even where the program obtained by the parent "might not have been adequate under the EAHCA [IDEA]," 790 F.2d at 1161, because "[t]he *Burlington* rule is not so narrow as to permit reimbursement only when the interim placement chosen by the parent is found to be the exact proper placement under the Act," *id.*, the Fifth Circuit remanded the matter for a determination of the amount of reimbursement due under the circumstances. *Id.*[11] The Fourth Circuit's decision here is not only perfectly consistent with, but is supported by, the Fifth Circuit's decision.[12]

The Second Circuit ruling came in *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563 (2nd Cir 1989). With scant analysis or explanation of the purported

---

[11] The Fifth Circuit's analysis and disposition were consistent with this Court's holding in *Burlington* that "equitable considerations are relevant in fashioning relief," 471 U.S. at 374, for violations of IDEA rights. *Id.*

[12] See also *Garland Independent School District v. Wilks*, 657 F. Supp. 1163, 1166-67 (N.D. Tex. 1987) (Low income parent was entitled to reimbursement for furnishing those services intended, to the extent the parent could afford, to create a "facsimile" of the residential placement ultimately ordered by the court). In addition, at least one state court has reached the same conclusion reached below. The Massachusetts Supreme Judicial Court has held that consistent with *Burlington*, parents may be reimbursed for unilateral private placements not on Massachusetts' list of approved schools. *See Carrington v. Commissioner of Education*, 404 Mass. 290, 296; 535 N.E.2d 212, 216 (1989).

conflict,[13] petitioners' claim that the decision below creates a conflict with *Tucker* warranting *certiorari*. [Pet. 13, 17]. The perceived conflict is illusory. First, the *Tucker* court did not sanction the results that ensue if petitioner's reading of *Tucker*--in which "state approval" meant approval under the regulatory scheme of the state of New York--is applied to the instant case, where "state approval" means approval under South Carolina's very different scheme. Second, *Tucker* did not condition reimbursement under *Burlington* upon compliance with the four-pronged statutory definition of "free appropriate public education." Third, *Tucker* ultimately rests on an interpretation of Fourth Circuit precedent rejected by the Fourth Circuit in the decision below.

A. *Tucker Is Not Applicable to States With Private School Approval Mechanisms Like South Carolina's.*

1. *Tucker by its terms assumes an approval mechanism like New York's.*

In Tucker, parents sought reimbursement for

[13] Petitioner describes the purported conflict as follows:

> "[t]he decision below creates a direct conflict over whether parents...may be entitled to reimbursement ...where they unilaterally transfer their child...to a private school which is not in compliance with state educational standards and otherwise fails to meet the statutory definition of a free appropriate public education." [Pet. 13]. As discussed *supra* at 6 n.3, the record below does not necessarily support the assertion that Trident Academy was not in compliance with state educational standards on teacher certification--the only area of possible noncompliance cited by petitioners--during the relevant time period. The district court made no finding of fact on this issue. [PA 28a n.10].

placement in a private school not included on the list New York maintained of private schools approved by the State Education Department for the provision of special education.[14] Although IDEA does not require states to maintain such a list, New York's system permitted a private facility seeking inclusion on the list to apply to the State Education Department which, after ascertaining that the school met state standards, approved it as a special education placement for New York students. See *Antkowiak v. Ambach*, 838 F.2d 635, 640-41 (2nd Cir.), *cert. denied*, 488 U.S. 850 (1988), discussion incorporated by reference in *Tucker*, 873 F.2d at 565. The school was then eligible to contract with local school boards for the provision of educational services to particular students. See *Antkowiak*, 838 F.2d at 640-41. Private facilities could apply for the approval necessary to be placed on the list quite apart from any admission, application or individual contract approval decisions regarding a particular New York child. *Id.*

The Second Circuit affirmed the district court's judgment for the school district, holding that New York parents may not obtain reimbursement for placement in schools not on New York's approved list. *Tucker*, 873 F.2d

[14] Contrary to the instant case, where there is no evidence that Trident Academy was ever disapproved by South Carolina for the provision of special education (generally or to any particular student), and where Trident apparently was approved to educate at least three South Carolina children, see *supra* at 5, the *Tucker* school may have been affirmatively disapproved by New York authorities. The Second Circuit's decision noted that "[t]here was evidence before the hearing officer that would suggest that Eagle Hill's unapproved status was at least in part the consequence of its unwillingness to follow the state approved curriculum or to admit emotionally disturbed students." *Tucker*, 873 F.2d at 564 n.1.

at 568.[18]

Critical to this holding was the fact that such a list of approved schools from which parents might identify a proper placement did, indeed, exist. By resort to the list New York parents could easily determine which schools have been approved by the state as meeting state educational standards. In conditioning *Burlington* relief upon placement at a state approved school, *Tucker* assumed, as per the particular state approval process before it, the existence of some number of private schools already generally approved by the state as special education facilities.

Nothing in the Second Circuit's decision contemplates any other sort of state scheme. Nowhere does *Tucker* require parents to initiate a state approval process where a state does not generally approve private schools. Nowhere does it put the onus on parents to determine whether a particular school could or would meet the standards required for state approval, or any other state educational requirements, where a state does not generally approve private schools. The Second Circuit's decision goes only so far as to require parents to choose from a list of schools already generally approved for the provision of special education in states where such a list exists.

South Carolina is not such a state. Unlike New York, South Carolina approves private schools for special education placements only on a case-by-case basis, only in reference to the proposed placement of a particular child, and only when the proposed private school placement is

[18] The court reasoned that placement in an unapproved school could not be proper under the Act, as *Burlington* requires, because it would abridge the requirement that placements "meet the standards of the State educational agency." 873 F.2d at 568, quoting 20 U.S.C. §1401(a)(18)(B). The significance of the court's citation to §1401(a)(18)(B)–a component of the statutory definition of "free appropriate public education" is discussed *infra* at 25-26.

initiated by the state or a local educational agency ("LEA"). S.C. Code R. 43-243(E), the relevant State regulation, provides in pertinent part only that

> "The State Department of Education shall have the responsibility to insure that educational programs and related services, when necessary, are provided to handicapped children in private schools at no cost to their parents--provided that such children are placed in private schools *by the LEA/SEA*. When it is necessary to accord special education and related services in programs other than the public schools, such placements shall not transpire until it has been determined that the child cannot be appropriately served by another governmental agency of South Carolina...When it is clearly not feasible to accord educational opportunity to handicapped children in a public school program, *the LEA* may contract with other agencies or organizations, public or private...*provided that proper application has been made by the LEA* and approved by the State Department of Education...
>
> ***
>
> (1) Upon submission *by the LEA* of a properly completed application...the Director, Office of Programs for the Handicapped, State Department of Education, may approve said application..."

Emphasis added. There is no list of approved private schools already determined by state education authorities to meet state standards, no mechanism by which a private school can apply for general approval to serve as a special education placement, no basis for *parents* to determine whether a particular private school meets state education

standards, and no mechanism for parents to seek approval for such a school.

Given these critical differences between the New York and South Carolina approval systems, *Tucker* by its own terms has no application here. There is thus no conflict between *Tucker* and the Fourth Circuit's treatment of this South Carolina matter.

2. *Construing Tucker to require state approval in states like South Carolina produces absurd results.*

If stretched beyond its facts and state law context to require "state approval" regardless of variations among the states, *Tucker* leads to the absurd conclusion that there can be no *Burlington* remedy in South Carolina because the state--whose failure to fulfill its IDEA obligation to ensure the provision of an appropriate education, see 20 U.S.C. §1412(6), triggered respondent's recourse to unilateral placement--will only approve private schools on a case-by-case basis at the behest of the offending school district.

The result is equally absurd if *Tucker* is stretched to impose upon parents a duty to determine whether a particular school meets state education standards in states that do not maintain lists of approved schools. In South Carolina, for example, if a child with disabilities is placed in a private school by the State education agency or local school district, the private school must comply with, *inter alia*, the Defined Minimum Program for South Carolina School Districts ("DMP") promulgated by the State Board of Education. S.C. Code R. 43-243(E)(7). The table of contents of the DMP is seven pages long, the DMP itself more than 130 pages. See S.C. Dept. of Educ., Defined Minimum Program for South Carolina School Districts (1986). Parents cannot reasonably be expected to assess compliance with these voluminous standards.

B. *Tucker Did Not Hold that Reimbursement Rights Extend Only to Placements in Private Schools That Meet the Four-Pronged Statutory Definition of "Free Appropriate Public Education."*

IDEA defines "free appropriate public education" as special education and related services that "(A) have been provided at public expense, under public supervision and direction, without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." 20 U.S.C. §1401(a)(18). "Individualized education program" is further defined by 20 U.S.C. §1401(a)(20) as "a written statement...developed in any meeting by a *representative of the local educational agency or intermediate educational unit*...the teacher, the parents or guardian of such child, and, whenever appropriate, such child..." Emphasis added. Section 1414(a)(5) requires a local school district applying to the State for IDEA funds to "provide assurances that...[it]...will establish or revise...an individualized education program...at the beginning of each school year..." 20 U.S.C. §1414(a)(5).

Tucker quotes the language of §1401(a)(18)(B) in support of its holding that private schools must be selected from the approved list without even noting that the provision is a component of the statutory definition of "free appropriate public education." *See* 873 F.2d at 568. Sections 1401(a)(18)(A), (C) and (D)--the remaining three prongs of the four-pronged definition--are neither acknowledged in the decision nor implicated by its facts. *Tucker* thus neither raised nor decided the issue of whether §1401(a)(18) limits the remedies under *Burlington* and, contrary to petitioners' assertion, there can be no "direct

conflict over whether parents...may be entitled to reimbursement ...where they...transfer their child...to a private school which...fails to meet the statutory definition of a free appropriate public education." [Pet. 13].

C. *Tucker Is Grounded On An Interpretation of Fourth Circuit Precedent Rejected By the Fourth Circuit in the Decision Below.*

Tucker relied solely upon *Antkowiak*, *supra*, in reaching its result. *See Tucker*, 873 F.2d at 568. In Antkowiak, a different panel of the Second Circuit had held that "[n]either the *SED* [New York State Education Department] nor the *Buffalo School Board* could place and fund...[the student] in an unapproved private school 'without violating the EHA's requirement that handicapped children be educated at public expense only in those private schools that meet [s]tate educational standards.'" *Antkowiak*, 838 F.2d at 640, quoting *Schimmel v. Spillane*, 819 F.2d 477,484 (4th Cir. 1987) (emphasis added). The district court thus acted improperly when it ordered education officials to place the student at a school not on the state's approved list. *Antkowiak*, 838 F.2d at 640-41.[16]

Antkowiak, the sole support in *Tucker*, relied exclusively upon the Fourth Circuit's decision in *Schimmel* to reach this result. *See Antkowiak*, 838 F.2d at 640. In the decision below in the instant case, however, the Fourth

[16] *Tucker* deemed *Antkowiak* dispositive, 873 F.2d at 568, even though the opinion in the latter did not discuss or hold on reimbursement issues. The district court judgment reversed in *Antkowiak* had ordered reimbursement as well as prospective placement; the *Tucker* panel concluded that the *Antkowiak* panel must have vacated the award of reimbursement for the same reason that it vacated the prospective placement order, "namely, the unapproved status of the placement." *Tucker*, 873 F.2d at 568.

Circuit explicitly limited *Schimmel* to situations where the school district *has* offered an appropriate placement, holding it inapplicable to cases like this one and *Tucker*, in which the school systems *fail* to do so. See 950 F.2d at 162-63; [PA 14a-15a]. The purported "conflict" between *Tucker* and the decision below is actually a conflict between the Fourth Circuit and the Second Circuit over the proper interpretation of Fourth Circuit precedent. This is not the sort of direct conflict that warrants review of the Fourth Circuit's decision by this court.

D. *Review of Any Perceived Conflict Would Be Premature at This Time.*

Few federal courts have addressed the issue of whether a unilateral placement must be made into a state approved school or otherwise meet state educational standards in order to qualify for *Burlington* reimbursement. It appears that no federal court outside of the Second Circuit--indeed, outside of New York--has conditioned *Burlington* reimbursement upon prior state approval of the private school in question. This Court should refrain from entertaining these issues until more courts have spoken to them so that it can have the benefit of a fuller exploration of the various contexts in which these questions may arise, and of the consequences of differing legal rulings.

The ruling below gives rise to no consequences favoring earlier review by this court. Contrary to petitioner's claim, [Pet. 18-19], the Fourth Circuit's decision does not relieve states of their continuing duty to provide a free appropriate public education. Parental placement and litigation to obtain reimbursement is not, as petitioners assert, "an alternative manner of fulfilling," [Pet. 19], the state's IDEA obligation to provide a free appropriate public education, *id.*, to which the statutory definition of that term ought therefore apply. It is a

remedy for *violation* of that obligation. By the very nature of that adversarial situation, at least two of the four components of the statutory definition inevitably will not be met by the private placement: special education and related services will not have been provided "under public supervision," 20 U.S.C. §1401(a)(18)(A), and they will not have been "provided in conformity with the individualized education program," 20 U.S.C. §1401(a)(18)(D), that, by its own statutory definition, must have been "...developed in any meeting by a representative of the local educational agency or intermediate educational unit..." 20 U.S.C. §1401(a)(20).

IDEA already provides a mechanism for assuring that educational agencies fulfill their ongoing duty to make available a free appropriate public education even after school district violations spur parents to unilateral placement and litigation. As the First Circuit held in the reimbursement case that led to this court's decision in *Burlington*, IDEA requires "[t]he continuation of the IEP process during the pendency of litigation." *Town of Burlington v. Department of Education*, 736 F.2d 773, 794 (1st Cir. 1984). "[P]ending review of an earlier IEP, local educational agencies should continue to review and revise IEPs in accordance with applicable law, at least in the absence of a stipulation between the parties providing for how the outcome of the suit will affect later years." *Id.*[17]

The decision below is no more an "open invitation" [Pet. 20] to parents "to circumvent rather than capitalize

[17] In addition, IDEA includes explicit statutory mechanisms for assuring that *states* take appropriate action when *local* educational agencies like petitioner violate IDEA rights. Chief among these are the ongoing obligation of the State education agency to monitor and enforce local compliance with statutory requirements, see 20 U.S.C. §1412(6), and the obligation to serve disabled children directly under certain circumstances when a local school district fails to offer an appropriate education. See 20 U.S.C. §1414(d)(1).

on public school services," *id.*, than is this court's decision in *Burlington*. Any costs beyond those that would have been incurred had petitioners provided an appropriate public school program are attributable to petitioners' failure to do so--not to the rights recognized by the court of appeals. Furthermore, the cost of providing an appropriate education may not dictate the placement chosen for a child with disabilities. *Barnett v. Fairfax*, 927 F.2d 146, 154 (4th Cir. 1991). Cost may be considered only when a choice exists among a selection of placements, all of which are appropriate to meet the child's educational needs. *Clevenger v. Oak Ridge School Board*, 744 F.2d 514, 517 (6th Cir. 1984); *cf. In re Smith*, 926 F.2d 1027 (11th Cir. 1991) (granting writ of mandamus and directing district court to approve settlement agreement calling for $160,000 placement under IDEA that lower court had rejected as against public policy because too expensive).

The students of Florence County School District Four would be better served if, rather than raising such false policy alarms, petitioners reexamined their special education system. That system failed to identify respondent's severe disability and, once compelled to recognize it by her parents, failed to address it in any meaningful way. Petitioners may be similarly failing other students.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

Kathleen B. Boundy
(Counsel of Record)
Eileen L. Ordover
Center for Law and Education, Inc.
955 Massachusetts Avenue
Cambridge, MA 02139
(617) 876-6611

Nancy McCormick
South Carolina Protection and Advocacy
System for the Handicapped, Inc.
3710 Landmark Drive, Suite 208
Columbia, S.C. 29204
(803) 782-0639

April 29, 1992

APPENDIX

S.C. Code §59-33-50. Establishment and operation of programs by school districts; contracts between districts; special arrangements for multiple-handicapped children.

The board of trustees of each school district shall, upon approval of its district's plan by the State Department of Education, establish and operate a program which will insure an appropriate education for each handicapped child resident within the district and shall maintain adequate records of the training and services provided and the children participating in the program. When a school district cannot satisfy the requirements of this section by providing for the education of its resident handicapped children because of insufficient numbers, the district may contract with other districts within the State or school systems or public or private institutions or agencies within or without the State which maintain approved special education facilities; *provided*, that such institutions or agencies shall accept applicable children into the program regardless of color, race, sex or religion. The sending district must document this lack of numbers and receive prior approval from the State Department of Education. The sending district may contract and pay the receiving district or institution the per capita cost of instruction, special equipment and special services not reimbursed to the receiving district by State, Federal and other moneys plus the cost of transportation and of maintenance if the nonresident children must reside away from their homes. The district which enters into such nonresident contract arrangements, which are approved by the State Department of Education, shall be reimbursed by the department for tuition, fees, transportation and books, not to exceed the per pupil cost of education a handicapped child of identical age in the public schools. Special arrangements for multiple-handicapped children for whom

special appropriations are provided because of the severity of their handicaps may be made with the Department.

S.C. Code R. 43-243(E). Policies Governing Placement in Private Schools. When Necessary to Carry Out the Requirements of the Act

The State Department of Education shall have the responsibility to insure that educational programs and related services, when necessary, are provided to handicapped children in private schools at no cost to their parents--provided that such children are placed in private schools by the LEA/SEA. When it is necessary to accord special education and related services in programs other than the public schools, such placements shall not transpire until it has been determined that the child cannot be appropriately served by another governmental agency of South Carolina. After determination has been made that neither the public schools nor another governmental agency of the state can adequately provide these services, then private programs within the state become the third alternative of choice. If such programs are still inadequate, then out of state private programs may be approved. Clearly, the intent of this policy is to insure economic efficiency to the maximal extent possible. When it is clearly not feasible to accord educational opportunity to handicapped children in a public school program, the LEA may contract with other agencies or organizations, public or private, within or outside South Carolina, provided that proper application has been made by the LEA and approved by the State Department of Education. Children enrolled in such programs shall have all the rights they would have if served by the LEA and the agency or organization must meet all the standards applicable to the LEA/SEA.

1. Upon submission by the LEA of a properly completed application form and any supplemental information that may be required, the Director, Office of Programs for the Handicapped, State Department of Education, may approve said application. Approval in this instance shall be made only for those applications where it is clearly practicable to provide special education and related services in a public school setting.

***

Supreme Court, U.S.
FILED
MAY 6 1992
OFFICE OF THE CLERK

No. 91-1523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

Of Counsel
BRUCE E. DAVIS
1704 Fair Street
Camden, S.C. 29020
(803) 432-2880

DONALD B. AYER
(Counsel of Record)
BETH HEIFETZ
DAVID A. YALOF
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. THE DECISION BELOW SQUARELY CONFLICTS WITH THE SECOND CIRCUIT'S DECISION IN *TUCKER* 2

II. THE DECISION BELOW ESTABLISHES A SERIOUSLY MISLEADING PRECEDENT BY REJECTING AN IEP BASED SOLELY ON GOALS THAT WERE LIMITED AT THE PARENTS' REQUEST 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986) 3

Board of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176 (1982) 5, 8, 9

Carrington v. Commissioner of Educ., 535 N.E. 2d. 212 (Mass. 1989) 3

Burlington Sch. Comm. v. Massachusetts Dep't of Educ., 471 U.S. 359 (1985) 5

Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563 (2d Cir. 1989) 2, 4, 7

STATUTES

Individuals with Disabilities Act, 20 U.S.C.A. §§ 1400-1485 (West 1988 & Supp. 1992) 2

20 U.S.C. § 1401(a)(18) 2, 3, 6, 7
20 U.S.C. § 1413(a)(4) 6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-1523

Florence County School District Four, Ernest K. Nicholson, Superintendent, in his official capacity, and School Board Members Bennie Anderson, Monroe Friday, Jack Odom, Elrita Bacote, T.R. Green, James W. Hicks, in their official capacities,

Petitioners,

v.

Shannon Carter, by and through her father and next friend, Emory Carter,

Respondents.

On Petition for a Writ of Certiorari to the The United States Court of Appeals for The Fourth Circuit

---

REPLY BRIEF FOR PETITIONERS

I. THE DECISION BELOW SQUARELY CONFLICTS WITH THE SECOND CIRCUIT'S DECISION IN *TUCKER*

The Fourth Circuit in this case ordered a public school district to reimburse parents for a unilateral placement in a private school that fails to meet state educational standards. In so doing, it ignored the fact that the state's statutory obligation is to provide disabled students with a "free appropriate public education," which by definition must "meet the standards of the State Educational Agency." Individuals with Disabilities Act, 20 U.S.C. § 1401(a)(18)(B) (West 1988 & Supp. 1992) ("Act" or "IDEA"). Thus, respondents sought, and the Fourth Circuit conferred, relief beyond the scope of the Act. This judicial adventurism weakens state and local control over educational policy, and diverts necessary financial support from important public education programs to unqualified private education programs at a time when public authorities can least afford it.

This failure to adhere to the Act's explicit requirements is the thrust of the conflict between the Fourth and Second Circuits. In *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563 (2d Cir. 1989), the Second Circuit recognized that the provision of a "free appropriate public education" -- which the state is obligated to provide as a condition of receiving federal funds under the Act -- is a prerequisite to any reimbursement for a private placement made on the unilateral initiative of the parents. Consequently, the court strictly applied the requirement that such placements must meet state educational standards if they are to be entitled to reimbursement at public expense. *Id.* at 568.

By contrast, the Fourth Circuit in this case jettisoned the standards requirement of § 1401(a)(18)(B) and upheld reimbursement for a long-term private placement that failed to meet the standards of the state educational agency.[1] In doing so, the court acknowledged its disagreement with *Tucker*, and in no way suggested that

---

[1] Neither of the two prior cases cited by the court below as consistent with its position are nearly so sweeping in their reasoning or disruptive in their implications. In *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1160-61 (5th Cir. 1986), the court upheld the award of reimbursement for two temporary summer placements, where some such placement -- but not the one selected -- was required under the Act. The court ordered consideration of full or partial reimbursement, looking to such factors as the availability of more suitable alternative placements, the effort expended by the parents in identifying them, and the general cooperativeness of the public authorities.

In *Carrington v. Commissioner of Educ.*, 535 N.E. 2d. 212, 216 (Mass. 1989), the Massachusetts Supreme Court found reimbursement to be *permissible* under existing regulations, and only with regard to a temporary, interim placement while the parents were litigating an "individualized educational program" ("IEP"). As in *Alamo Heights*, the court remanded for consideration of whether reimbursement should be awarded for this interim period.

Both of these decisions involve claims for reimbursement for relatively short interim periods, where various constraints of time and other concerns may have influenced parental selection of a non-approved placement. Neither requires the conclusion -- and neither court stated, as did the Fourth Circuit here -- that parents are generally entitled to reimbursement for beneficial private school placements whether or not they meet the statutory requirements of a "free appropriate public education" which the statute imposes on the state and local agencies. Pet. App. 16a. Accordingly, the present decision calls for review by this Court in a way that the prior decisions did not.

the cases could somehow be reconciled on the basis of factual differences.[2]

Respondents' determined effort to distinguish this case from *Tucker* by highlighting the difference between New York and South Carolina procedures for approving private school placements under the Act misunderstands this fundamental disagreement between the two courts. The Act itself does not distinguish -- or even discuss -- any necessary criteria for implementing approval procedures. The IDEA's central requirement -- that the state guarantee to every child with disabilities a "free appropriate public education" -- applies whether or not the particular state compiles lists of approved schools as part of its administration of the IDEA. The Act does not render the state educational standards requirement inapplicable simply because the public education agency's approval process depends upon affirmative requests rather than the use of a list.

Nor does the application of the statute as written impose any unfairness on the Carters in the context of the South Carolina approval process. Mr. and Mrs. Carter could have advised the school district that they were opting for private placement, and then inquired as to whether Trident or other available schools met state educational standards. Instead, they chose to make their

[2] The Court of Appeals below noted "that courts have differed on the question presented here," and expressly chose to "decline to follow the *Tucker* decision." Pet. App. 15a-16a. In refusing to adopt the Second Circuit's conclusion (*Tucker*, 873 F.2d at 568) -- that "a parent may not obtain reimbursement for a unilateral placement" in unapproved private schools -- the Fourth Circuit did not limit the effects of its decision to South Carolina's particular approval process.

own unilateral decision without any such inquiry or any effort to cooperate further with the public authorities who they expected to pay the bill. Such autonomy in parental selection of a publicly-funded, private education is fundamentally at odds with the approach of the IDEA, which is designed to foster interaction and cooperation between parents and school authorities. *See Board of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982) (noting Congress's emphasis upon full participation of all concerned parties throughout the development of the IEP); *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359, 368 (1985) (parents and school officials must work together in a "cooperative approach").

Respondents' effort to depict Trident as an appropriate education by other standards is also irrelevant to the circuit conflict at issue here. The decision below explicitly acknowledges that Trident Academy does not meet state educational standards for teacher certification, Pet. App. 11a-12a, and holds categorically that state educational standards need not be met where the publicly funded, private education is selected unilaterally by the parents. Pet. App. 16a-17a. Whatever may be the merits of Trident, including its ability to elicit private accreditation from the Southern Association of Colleges and Schools, Opp. Br. 15, the Fourth Circuit decision stands four-square for the proposition that where a single public school placement is found inappropriate, parents need not feel constrained by state educational requirements in selecting a private school alternative.[3]

[3] Respondents note the court of appeals' observation that previously three students have been referred to Trident by South Carolina

Respondents seek to justify this conclusion, as did the Fourth Circuit, Pet. App. 16a, by relying on a separate section of the Act that speaks to the elements of a state plan, but not to the definition of a "free appropriate public education." *See* § 1413(a)(4)(B). Opp. Br. at 16-18. In stating what must be spelled out in the plan, this section does not purport, and cannot fairly be read, to alter the fundamental obligation that the statute imposes on states: to guarantee to all children a "free appropriate public education." Nor does it suggest that certain elements of the required "free appropriate public education" as set forth in § 1401(a)(18) are waived in the comparatively rare case of a unilateral private placement by the parents.

On the contrary, § 1413(a)(4)(B) simply says that state plans required under the Act must specifically address how state standards will be met in connection with the relatively frequent state agency referrals to private educational providers. The section does not require the plan to address how state standards will be realized with regard to unilateral private referrals, perhaps because the drafters did not envision such actions: The statute was designed to promote school and parental cooperation in the provision of an appropriate public education, not to encourage unilateral parental decisionmaking. There is certainly no inference to be drawn from that omission that

---

public schools. Opp. Br. 15; Pet. App. 5a-6a. The record contains no information on when these referrals occurred and whether Trident met state educational standards at that time. In no way does the fact of prior placements under undefined circumstances qualify the court of appeal's statements that at the times relevant to this case, Trident did "not attempt to comply with the terms of the Act," either in the certification of its teachers or with regard to the Act's IEP requirements. Pet. App. 11a.

the statute imposes funding obligations on states going far beyond the free appropriate public education required in the statute.

Nor does respondents' contention that two of the four requirements of § 1401(a)(18) can never be met in the private school context support the Fourth Circuit's judicial revision of the statute. Opp. Br. 28. To the contrary, it appears that those standards can in fact be satisfied in public and private schools alike. First, the "public supervision" requirement in § 1401(a)(18)(A) may be met if states are permitted to enforce their standards in the private school context.

Second, public agency participation in the IEP procedures required by § 1401(a)(18)(D) can be implemented even where parents have unilaterally placed the child in a private school setting. No reason has been given and none appears that necessarily forecloses public school officials from continuing to assist in planning the private program of education that is to be funded at public expense. If for some reason public agency participation is not possible in a particular case, the IEP process outlined in the statute can still go forward through meetings between the parents and the private school officials. In all events, Mr. and Mrs. Carter and Trident made no effort to involve the education officials or to follow any of the IEP procedures mandated under the Act. Pet. App. 11a.

In sum, there is a clear conflict, recognized by the Fourth Circuit itself, between the decision below and that of the Second Circuit in *Tucker*. As evidenced by the three amicus briefs offered in support of the petition by

representatives of public educational agencies,[4] it is a disagreement of far more than academic interest. By enforcing an obligation of reimbursement for a private school placement unilaterally selected by the parents, even though it does not meet state educational requirements or otherwise meet the definition of a "free appropriate public education," the court below has created a state funding obligation that has no basis in the language of the IDEA. The statute as rewritten by the Fourth Circuit greatly increases the financial burden on public agencies and decreases their control over educational policy and curriculum. For all of these reasons, plenary review by this Court should be granted.

II. THE DECISION BELOW ESTABLISHES A SERIOUSLY MISLEADING PRECEDENT BY REJECTING AN IEP BASED SOLELY ON GOALS THAT WERE LIMITED AT THE PARENTS' REQUEST

Respondents concede that the decision below focused "on the limited annual goals of the proposed IEP in assessing its appropriateness." Opp. Br. 13. Given that this narrow inquiry is fundamentally at odds with the essential question posited by *Rowley*, 458 U.S. at 206-07 -- whether the program is "reasonably calculated" to confer educational benefits upon the child -- this Court's review is warranted.

---

[4] *See* Brief of the States of Louisiana, Maryland, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Utah, and Wyoming as Amici Curiae in Support of Petitioners; Brief of the National Association of State Boards of Education as Amicus Curiae in Support of Petitioners; and Brief of the National School Boards Association as Amicus Curiae in Support of Petition for Writ of Certiorari.

Respondents seek to avoid that result by reciting the facts of this case at great length, *i.e.*, the details of Shannon's learning disability and how the IEP agreed upon was inappropriate to meet her needs. Yet the Fourth Circuit relied exclusively on the limited program goals in judging the program and ignored the substantive adequacy of the program itself.

The benefits Shannon received during the period the IEP was in effect were evident (JA 149, 263, 269, 271, 292-293) -- respondents assert only that other factors played a role in her progress. Yet to conform to the dictates of *Rowley*, it is this progress that must be considered. The Fourth Circuit ignored Shannon's progress -- indeed ignored the substance of the IEP entirely -- and focused instead on limited goals that were kept low at the request of the Carters' own advisor.

This highly skeptical approach to review of public agency placements under the IDEA is seriously at odds with the approach taken by this Court in *Rowley*. There, this Court viewed the statute as creating a "basic floor of opportunity," while leaving to the states the "primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs . . . ." 458 U.S. at 201, 207. Because the decision below can be expected to mislead other courts in performance of the oft-recurring judicial task of reviewing IEPs, certiorari should be granted on this issue.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

Of Counsel
Bruce E. Davis
1704 Fair Street
Camden, S.C. 29020
(803) 432-2880

DONALD B. AYER
(Counsel of Record)
BETH HEIFETZ
DAVID A. YALOF
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioners

May 6, 1992

Supreme Court, U.S.
FILED
JAN - 8 1993
OFFICE OF THE CLERK

No. 91-1523

In the Supreme Court of the United States

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ET AL., PETITIONERS

v.

SHANNON CARTER, A MINOR, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

AMY L. WAX
Assistant to the Solicitor General

WILLIAM KANTER
JOHN P. SCHNITKER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, after determining that petitioners failed to meet their statutory obligation under the Individuals with Disabilities Education Act (IDEA or the Act), 20 U.S.C. 1400 *et seq.* (1988 & Supp II 1990), to provide respondent Shannon Carter with a "free appropriate public education," the district court had authority to order petitioners to reimburse respondent for the costs of Shannon's education in a private school, chosen by her parents, that did not "meet the standards of the State educational agency" under Section 1401(a)(18)(B) of the Act, but that did provide Shannon with an "appropriate" education.

2. Whether the court of appeals correctly determined that petitioners failed to meet their responsibility under the IDEA to provide respondent Shannon Carter with a "free appropriate public education."

TABLE OF CONTENTS

	Page
Statement	1
Argument	8
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Alamo Hgts. Ind. Sch. Dist. v. *State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986)	16, 17
Bell v. *Hood*, 327 U.S. 678 (1946)	17
Board of Educ. v. *Rowley*, 458 U.S. 176 (1982)	8-9, 10, 11, 12
California v. *American Stores Co.*, 495 U.S. 271 (1990)	12
Carrington v. *Commissioner of Educ.*, 404 Mass. 290 (1989)	17
Franklin v. *Gwinnett County Pub. Schools*, 112 S. Ct. 1028 (1992)	12, 17
Hall v. *Cole*, 412 U.S. 1 (1973)	12
Honig v. *Doe*, 484 U.S. 305 (1987)	2
Porter v. *Warner Co.*, 328 U.S. 395 (1946)	12
School Committee of the Town of Burlington v. *Department of Educ.*, 471 U.S. 359 (1985)	5, 12, 13, 14, 15, 16, 17
Town of Burlington v. *Department of Educ.*, 736 F.2d 773 (1st Cir. 1984), aff'd, 471 U.S. 359 (1985)	17
Tucker v. *Bay Shore Union Free School Dist.*, 873 F.2d 563 (2d Cir. 1989)	7, 17, 18

Statutes and regulation:

Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* (1988 & Supp. II 1990)	1
20 U.S.C. 1400(c)	1
20 U.S.C. 1401(a)(18)	2, 4, 15
20 U.S.C. 1401(a)(18)(A)	15
20 U.S.C. 1401(a)(18)(B)	7, 9, 12, 14, 16, 18, 19
20 U.S.C. 1401(a)(18)(D)	15

Statutes and regulation—Continued:	Page
20 U.S.C. 1401(a)(20)	2, 15
20 U.S.C. 1411-1415	2
20 U.S.C. 1412	4
20 U.S.C. 1412(1)	2
20 U.S.C. 1412(4)	15
20 U.S.C. 1412(5)(B)	2
20 U.S.C. 1413	2
20 U.S.C. 1413(a)(4)(B)	7, 14, 16
20 U.S.C. 1414(a)(5)	2, 3, 15
20 U.S.C. 1415(e)(2)	7, 10, 12
20 U.S.C. 1415(e)(3)	13
20 U.S.C. 1420	2
S.C. Code Regs. § 43-243E (1982)	14

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1523

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ET AL., PETITIONERS

v.

SHANNON CARTER, A MINOR, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In the Individuals With Disabilities Education Act (IDEA or the Act), 20 U.S.C. 1400 *et seq.* (1988 & Supp. II 1990), Congress sought to assure the availability to all disabled children of "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. 1400(c). Congress sought to "assist States and localities to provide for the education of all children with disabilities," *ibid.*, by

offering financial assistance to States in exchange for the States' agreement to comply with the federal statutory standards and procedures. 20 U.S.C. 1411-1415, 1420.

In order to qualify for federal financial assistance under IDEA, a State must demonstrate that it "has in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. 1412(1). That policy must be reflected in a state plan, approved by the Secretary of Education, that describes the goals, programs, and timetables under which the State intends to educate children with disabilities within its jurisdiction. 20 U.S.C. 1412, 1413.[1] At the local level, IDEA requires the pertinent public education authority to prepare, and review annually, an "individualized education program" (IEP) for each disabled child. 20 U.S.C. 1401(a)(20), 1414(a)(5). As this Court has noted, the IEP is the "centerpiece of [IDEA's] education delivery system for disabled children." *Honig* v. *Doe*, 484 U.S. 305, 311 (1987). The IEP describes the individualized instruction and services that will be provided to the disabled child, and sets goals for educational achievement. 20 U.S.C. 1401(a)(18) and (20), 1414(a)(5).[2]

[1] Among other things, the State must demonstrate that, "to the maximum extent appropriate," it will educate children with disabilities "with children who are not disabled," unless "the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. 1412(5)(B). This is known as the "mainstreaming" requirement.

[2] An IEP is developed jointly by school personnel, the parents of the disabled child, and, where appropriate, the child himself. The IEP ordinarily includes a statement of the child's present levels of educational performance, the annual educational goals (including short term instructional objectives), the specific educational services to be provided, and the criteria and evaluation procedures for determining, on an annual basis, whether instructional objectives are being achieved. 20 U.S.C. 1401(a)(20). The local education agency must provide for yearly review of the IEP, and must make appropriate revisions in the plan if necessary. 20 U.S.C. 1414(a)(5).

In addition to establishing detailed requirements for the IEP, IDEA also grants parents or guardians of children with disabilities certain procedural rights with regard to decisions concerning the child's education, including the right to examine relevant records, the right to a hearing before the local educational agency and review of the agency's decision by the State, and the right to challenge the State's decision in a civil action in either state or federal court.

2. In 1982 and 1983, respondent Shannon Carter was a student in the seventh grade at the Timmonsville public school operated by petitioner Florence County School District Four.[3] As a result of poor performance, Shannon was tested twice by the school district in 1983 for potential learning disabilities. The school district concluded that Shannon's test results at that time did not qualify her as a learning disabled student. Pet. App. 3a, 24a.

In 1984, Shannon's continued poor performance in the ninth grade prompted her parents to seek additional testing from the school district. Based on tests conducted in April 1985, the school psychologist concluded that Shannon exhibited a "serious learning disability" under South Carolina State Department of Education criteria. Pet. App. 4a, 25a. On May 1, 1985, school personnel and Shannon's parents held a meeting to formulate an individualized education program (IEP) for Shannon. The school district proposed that Shannon remain in regular classes but spend at least two hours daily in the "resource room." Shannon's parents objected to this plan because it would require Shannon to attend a special education class alongside emotionally ill and mentally retarded students. Instead, her parents proposed an "itinerant" program under which Shannon would remain in regular classes but

[3] After attending Timmonsville Elementary School for the first grade, Shannon apparently attended the Roy Hudgens Academy, a private school, for grades two through six. Pet. App. 3a, 23a.

receive individualized instruction for three periods per week. An IEP was prepared based on this placement, was signed by the school district and Shannon's parents, and became effective on May 2, 1985. The IEP established goals in reading and mathematics of four months' progress for the school year. *Id.* at 4a-5a, 26a-27a.

Dissatisfied with the IEP, Shannon's parents requested a hearing to challenge the school district's educational program.[4] On August 20, 1985, a hearing was held by a local educational hearing officer, who concluded that petitioners were "providing an adequate academic program" for Shannon. Pet. App. 44a-54a. On October 14, 1985, this conclusion was upheld on review by the state Department of Education. *Id.* at 40a-43a. In the meantime, Shannon's parents decided that Shannon should be placed at the Trident Academy in Mt. Pleasant, South Carolina, a private academy specializing in the education of learning disabled children. Shannon began courses at Trident in September 1985 and ultimately graduated from that institution in the spring of 1988. *Id.* at 5a, 28a. Trident is fully accredited by the Southern Association of Colleges and Schools. Shannon's parents, however, did not seek approval for Shannon's placement at Trident from the South Carolina Department of Education. *Ibid.*

3. In July 1986, Shannon's parents filed this suit on her behalf, claiming that petitioners breached their duty under IDEA to provide Shannon with a "free appropriate public education." Pet. App. 6a. See 20 U.S.C. 1412, 1401(a)(18). The complaint also sought reimbursement for tuition and other costs incurred at Trident under this Court's

[4] The district court commented that, although Shannon's parents signed the IEP, they clearly "were not satisfied with the plan." It found that, since an IEP "is not a binding contract," and can be challenged by the parents at any time, the fact that the parents signed the document was irrelevant to the dispute concerning the adequacy of the IEP. Pet. App. 27a.

decision in *School Committee of the Town of Burlington* v. *Department of Educ.*, 471 U.S. 359 (1985) (*Burlington*). After a three-day bench trial, the district court ruled that the school district had violated IDEA. Pet. App. 20a-39a. Although the court found "no serious procedural non-compliance [with the Act] on the part of the school district," *id.* at 34a-35a, it concluded that the school district had failed "to provide Shannon Carter with a free appropriate public education." *Id.* at 36a. The court determined that the school district's "offer of only three periods of itinerant study per week failed to meet Shannon's educational needs" and that the achievement goals set by the IEP "were wholly inadequate" since, even if Shannon met them, she would "continue to fall behind her classmates at an alarming rate." *Id.* at 27a, 36a.

The district court also found that, "[a]lthough [Trident Academy] did not comply with all of the procedures outlined in [IDEA],"[5] the school "provided Shannon an excellent education in substantial compliance with all the substantive requirements" of the statute. Pet. App. 37a.[6]

[5] The court did not elaborate on the "procedures" with which Trident failed to comply. However, the court elsewhere noted that the school had "not been approved by the South Carolina State Department of Education" as an appropriate placement for handicapped children, Pet. App. 37a, and that it would not likely be eligible for approval because it failed to meet the state requirement that it employ only certified teachers. *Id.* at 28a. See also *id.* at 11a (court of appeals' observation that Trident "does not, for example, develop education plans called IEPs," as the Act requires, and that it employs "at least two faculty members" who are not "certified by the state."); *id.* at 62a-71a (South Carolina regulations setting forth educational requirements for certification of teachers of disabled children).

[6] The court stated that Trident "evaluated Shannon quarterly, not yearly, as mandated by the [Act], it provided Shannon with low teacher-student ratios, and it developed a plan which allowed Shannon to receive passing marks and progress from grade to grade." Pet. App. 37a. The court also noted the findings of its own expert, Dr. Richard Nagle, who tested Shannon and found that she had "made significant

The court rejected petitioners' argument that the school district could not be ordered to pay tuition reimbursement because the school in which Shannon's parents placed her "had not been approved by the South Carolina State Department of Education." *Ibid.* The court observed that "[t]his case involves a situation where the school district failed to provide the child with a free appropriate public education, and the only way the parents could provide the same to their daughter within a meaningful time frame was to enroll her in a private school." *Id.* at 38a. The court concluded that "[n]othing in the existing law or regulations" imposes the "stringent requirements advanced by [petitioners]" as a precondition to reimbursement for parents' unilateral placement under these circumstances. *Ibid.* The court awarded respondent $35,716.11 in reimbursement for costs incurred in connection with Shannon's education at Trident, together with prejudgment interest. *Id.* at 21a, 29a-32a, 39a.

4. The court of appeals affirmed. Pet. App. 1a-19a. Observing that the IEP's goal of "four months progress over a period of more than one year was rather modest" and "failed to satisfy the Act's requirement of more than minimal or trivial progress," the court of appeals upheld the district court's determination that the school district failed to provide Shannon with a free appropriate public education under the Act. *Id.* at 7a-8a.

The court also upheld the district court's order of reimbursement, rejecting petitioners' argument that reimbursement is authorized under the statute "only when parents place their child in a private school approved by

progress at Trident." *Id.* at 29a, 37a. The court observed that "Shannon entered Trident Academy in the fall term of 1985 as a functional illiterate." *Id.* at 25a. Dr. Nagle found that, during Shannon's time at Trident, "her reading comprehension had risen from a level of 4.7 in 1985 to 7.8 in 1988." *Id.* at 29a.

the state." Pet. App. 12a. The court noted that, although Trident's "educational program in many ways parallels" the Act's requirements, Trident "does not attempt to comply with the terms of [IDEA]."[7] *Id.* at 11a. It held, however, that this was not "fatal to the request for reimbursement." *Id.* at 11a, 12a. The court observed that the Act's remedial provision—which authorizes the court to "grant such relief as [it] determines is appropriate," 20 U.S.C. 1415(e)(2)—is a "broad grant of equitable power designed to provide courts maximum flexibility in effectuating the statutory objectives." Pet. App. 18a; *id.* at 10a. It noted further that the requirement in Section 1413(a)(4)(B) "that private schools receiving funds under the Act meet state educational standards" applies "only when the child is placed in the private school by the state or local school system." Pet. App. 13a. The court concluded that "the Act itself simply imposes no requirement that the private school be approved by the state in parent-placement reimbursement cases." *Ibid.*

The court recognized that the Second Circuit had taken a contrary view in *Tucker* v. *Bay Shore Union Free School District*, 873 F.2d 563 (2d Cir. 1989). Pet. App. 15a-17a. The *Tucker* court relied on the definition of "free appropriate public education" in the Act, see Section 1401(a)(18)(B), and on the Court's statement in *Burlington*, 471 U.S. at 369, that reimbursement is appropriate only if "the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." Pet. App. 15a. The court "decline[d] to follow the *Tucker* decision," however, concluding that this Court in *Burlington* did not intend "to impose on private schools chosen by parents the whole panoply of duties that the Act imposes on the state." *Id.* at 16a.

[7] See note 5, *supra*.

Relying on *Board of Educ.* v. *Rowley*, 458 U.S. 176, 207 (1982), the court of appeals held that, "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.'" Pet. App. 17a. The court noted that petitioners did not dispute the district court's conclusion that "Trident Academy provided Shannon with an appropriate education, which is a prerequisite to reimbursement under *Burlington*." *Id.* at 10a n.2. The court explained that "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." *Id.* at 18a.[8] Thus, the court concluded, the Act does not "forbid[] reimbursement when parents place their child in a private school that has not been approved by the state." *Id.* at 17a.

ARGUMENT

Petitioners present two issues for review. They contend that the lower courts erred in concluding that they failed to meet their responsibility under IDEA to provide Shannon Carter with a "free appropriate public education." We disagree. In our view, the lower courts correctly applied this Court's decision in *Board of Educ.* v.

[8] The court noted that "parents who unilaterally place their child in an unapproved private school bear substantial risks," including the risk that the IEP offered by the public school will be found adequate or that the private school chosen by the parents will fail to provide an appropriate education—i.e., one "reasonably calculated to enable the child to receive educational benefits." Pet. App. 17a, 18a-19a (quoting *Rowley*, 458 U.S. at 207). In either case, the panel noted, "the parents cannot receive reimbursement, whether or not the private school in question is state approved." Pet. App. 18a-19a.

Rowley, 458 U.S. 176 (1982), in deciding that the IEP proposed by petitioner school board did not meet statutory requirements. We do not, in any event, believe that that fact-specific question merits this Court's review.

Petitioners also contend that, in the event of a default of a State's obligations under IDEA, courts lack authority to award reimbursement to parents for the costs of an eligible child's education in a private institution that does not meet the standards of the state educational agency under Section 1401(a)(18)(B). Relying on the district court's factual findings, the court of appeals agreed that Shannon's educational program at Trident Academy was "appropriate" under the Act, in the sense that it was reasonably calculated to enable her to receive educational benefits. See *Rowley*, 458 U.S. at 206-207. Petitioners have not directly challenged that conclusion here. Thus, the question for decision is whether the Act permits courts to order reimbursement for the costs of an appropriate private placement that does not meet formal standards established by the State for the education of the disabled. In our view, the statute does not forbid courts from ordering reimbursement in these circumstances, and the court of appeals was correct to uphold the order of reimbursement in this case. We do not agree with petitioners, however, that review of the reimbursement issue is necessarily warranted in this case. Although the courts of appeals disagree in their interpretation of the statutory provisions governing the scope of relief available under the Act when parents place their children in private schools, that disagreement has arisen in divergent factual settings. Because the Court could decide this case on narrow grounds without definitively resolving the issue of statutory construction on which the courts of appeals conflict, it would be appropriate for the Court to decline review in this case. Alternatively, since the courts of appeals have acknowledged a conflict in their reasoning,

the Court may properly conclude that it should address the reimbursement issue at this time.

1. The courts below correctly concluded that the IEP proposed by the school district failed to provide Shannon with an "appropriate" education within the meaning of the Act. The inquiry in a suit challenging a State's compliance with the requirements of IDEA is twofold. First, the court must determine whether the State complied with the procedures set forth in the Act; second, the court must decide whether the IEP developed through IDEA's procedures is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-207.

In suits challenging educational placements, the Act specifically authorizes district courts to "receive the records of the administrative proceedings," to "hear additional evidence at the request of a party," and to "grant such relief as the court determines is appropriate" based upon "the preponderance of the evidence." 20 U.S.C. 1415(e)(2). In *Rowley*, this Court held that the courts' task under this provision is to make "independent decision[s] based on a preponderance of the evidence," but that the requirement that the record of the state administrative proceedings be filed with the court "carries with it the implied requirement that due weight shall be given to those proceedings." 458 U.S. at 205-206.[9]

In this case, the district court agreed that "there exists no single substantive standard describing exactly how much educational benefit is sufficient to satisfy [IDEA]." Pet. App. 35a. However, since the IEP proposed by petitioners would have left Shannon, to a large extent, "in the regular classrooms of [the] public school system," the

[9] The Court in *Rowley*, 458 U.S. at 205, rejected the argument that courts have "no power to review the substance of the state program," noting that Congress declined to incorporate proposed language "that would have made state administrative findings conclusive if supported by substantial evidence."

district court focused on an "important factor" identified in *Rowley* for evaluating educational progress of disabled children that have been "mainstreamed" in public schools: whether the student has received "an individualized program that would allow her to receive passing marks and advance from grade to grade." Pet. App. 35a-36a (quoting *Rowley*, 458 U.S. at 207 n.28); see also *id.* at 204. The district court noted that the IEP's goal of four months' educational progress over an entire school year guaranteed that Shannon "would continue to fall behind her classmates at an alarming rate." Pet. App. 36a. In addition, the court determined, based on the testimony of various experts, that the goals set in the IEP were "wholly inadequate" for Shannon. *Id.* at 27a. The court found that "three periods of itinerant study a week [proposed in the IEP] failed to meet Shannon's educational needs," *id.* at 36a, and that "Shannon was in need of an intensive self-contained [learning disabled] environment," *id.* at 27a, in order to make progress that would be adequate under the Act. Based on these findings, the court held that the IEP proposed by petitioners "did not provide Shannon with a free appropriate public education as required by [the Act]." *Id.* at 36a. The court of appeals affirmed this conclusion as not "clearly erroneous." *Id.* at 8a.

These conclusions are fully consistent with *Rowley*. In light of the record in this case and the district court's findings, the court of appeals' decision cannot properly be read as establishing the rate of advancement from grade to grade proposed in the IEP as the sole criterion for the adequacy of an educational program under the Act. See Pet. 23. Although the district court found that the plan's educational goals were too modest, that was not the only basis for its conclusion that the IEP did not satisfy the Act's minimum standards. Rather, the court determined that the proposal for three special education sessions per

week fell short of meeting Shannon's basic educational needs, and that Shannon required placement in an "intensive self-contained [learning disabled] environment" in order to make even minimally acceptable progress. Pet. App. 27a. In effect, the district court concluded that, in light of Shannon's individual needs and abilities, the plan proposed by petitioners was not "reasonably calculated" to enable her to receive the degree of educational benefit that would satisfy the Act's requirements. See *Rowley*, 458 U.S. at 206-207. Because the decision on this question merely involves the application of established legal standards to the facts of this case, it does not merit review.

2. a. The district court did not exceed its remedial authority under the statute by ordering tuition reimbursement for Shannon's education at Trident, even though the school did not "meet the standards of the State educational agency." 20 U.S.C. 1401(a)(18)(B). Congress authorized the federal courts to "grant such relief [for violations of the Act] as the court determines is appropriate," 20 U.S.C. 1415(e)(2). As this Court recognized in *Burlington*, 471 U.S. at 369, that provision "confers broad discretion on the court." When, as here, the statute grants broad authority to remedy a statutory violation, the courts may award any remedy that "is compatible with sound and established equitable principles," *Hall* v. *Cole*, 412 U.S. 1, 12 (1973), and is calculated to advance the statutory purpose. *Porter* v. *Warner Co.*, 328 U.S. 395, 400 (1946); see also *California* v. *American Stores Co.*, 495 U.S. 271, 295 (1990). Cf. *Franklin* v. *Gwinnett County Public Schools*, 112 S.Ct. 1028, 1032, 1034-1035 (1992).

This Court considered the scope of courts' remedial powers under IDEA in *Burlington* v. *Department of Educ.*, 471 U.S. 359 (1985), in which it held that the statute permits a court to award tuition reimbursement for the cost of a private education chosen by the parents if the

education offered by the local school board fails to meet the Act's requirements. In *Burlington*, the parents of the disabled child withdrew him from the public school system and placed him in a private school that was generally authorized for such placements by the State. 471 U.S. at 362-363. Because the State had not approved the particular change in placement, however, the school district contended that the placement violated Section 1415(e)(3) of IDEA—which requires retention of the child "in the then current educational placement" unless "the State or local educational agency and the parents * * * otherwise agree"—and that, as a result, the parents' right to reimbursement was forfeited. This Court rejected the argument. It reasoned that, if the parents' failure to procure the educational agency's agreement to a change in placement, in apparent violation of Section 1415(e)(3), is held to cut off parental rights to reimbursement in the event of the State's default, "the principal purpose of the Act will in many cases be defeated in the same way as if reimbursement were never available." That is because school officials who disagree with parents concerning the adequacy of the current educational placement are unlikely to "agree to an interim private school placement while the review process runs its course." 471 U.S. at 372. As a result,

> the parents are forced to leave the child in what may turn out to be an inappropriate educational placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement. The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.

Ibid.

In this case, in contrast with *Burlington*, 471 U.S. at 362-363, the private school in which the parents placed Shannon was not approved by the State and did not meet state educational standards. If tuition reimbursement were barred unless a school met state educational standards, however, Shannon's parents would be faced with an untenable choice like the one posed in *Burlington*: that of procuring an appropriate education for their disabled child only at the cost of forgoing a free one. As respondent points out, Br. in Opp. 23-24, South Carolina does not have a process by which private schools can obtain general state approval for programs for disabled children. Nor is there any other apparent mechanism by which parents can ascertain whether a private school, even if not directly approved by the State, meets "the standards of the State educational agency" under Section 1401(a)(18)(B). See Br. in Opp. 22-24 (citing S.C. Code Regs. § 43-243E (1982)).[10] In practice, then, Shannon's parents would be unable to verify that a private school met state standards; they therefore could not guarantee that an alternative private placement satisfied that proposed prerequisite for reimbursement.

In this situation, it would defeat the remedial purposes of the Act to deny reimbursement for the costs of providing an "appropriate" education when the State has defaulted on its statutory obligation to do so. In this setting, no less than in *Burlington*, the parents' right to obtain a free, appropriate education for their child would be held hostage to the state or local agency's willingness to cooperate in the parents' efforts to find an alternative

[10] IDEA permits States or local educational agencies to fulfill their obligations under the Act by placing disabled students in private educational institutions in lieu of public schools. See Section 1413(a)(4)(B). It is only in this setting that the South Carolina regulations implementing IDEA provide for state evaluation and approval of a private school for the placement of a disabled child. See Br. in Opp. 22-23 (quoting S.C. Code Regs. § 43-243E (1982)).

placement for their child. As suggested in *Burlington*, however, the state educational agency cannot be expected to assist parents in their effort to reject the educational program that the agency has proposed by helping them to assess a private school's compliance with "voluminous" state and statutory requirements. See Br. in Opp. 24.[11]

Petitioners argue (Pet. 12-21) that, since their obligation is to provide Shannon with a "free appropriate public education" under IDEA, they cannot be required to pay for

[11] Indeed, where the parents and school officials disagree over the need for an alternative placement, it is unlikely that the parents can guarantee that their child's private school education would meet all the definitional elements of a "free appropriate public education" under Section 1401(a)(18). For example, Subsection (a)(18)(A) requires that a "free appropriate public education" be provided "under public supervision and direction," and Subsection (a)(18)(D) requires that it be provided "in conformity with the individualized education program required under section 1414(a)(5)." The statute requires that the IEP be formulated jointly by the school, parents, and the "local educational agency." 20 U.S.C. 1401(a)(20). In addition, the agency or "intermediate educational unit" must "establish or revise" the IEP at least "annually," 20 U.S.C. 1414(a)(5), 1401(a)(18)(D). Thus, petitioners would make parents responsible for the private school's production of a detailed educational plan in cooperation with, and under the supervision of, the local educational agency, and for the agency's periodic review and revision of such a plan. See Pet. 15-16 (acknowledging that, in order to be eligible for tuition reimbursement, parents must show that the private education conforms to Section 1401(a)(18)(D)). However, as this Court recognized in *Burlington*, 471 U.S. at 372, state and local education officials who disagree with parents over the placement of a disabled child are unlikely to provide "supervision and direction" over the education of that child in the private institution chosen by the parents or to participate in annual revisions to that child's IEP. These considerations corroborate our view (see pages 15-16, *infra*) that it is the state or local educational agency, and not the parents, that must satisfy the various elements of Section 1401(a)(18). See, *e.g.*, 20 U.S.C. 1412(4) (*State* must provide assurances that the *local educational agency or unit* will establish and periodically review and revise IEP that meets statutory requirements).

Shannon's education at an institution that does not meet the criteria set forth in Section 1401(a)(18)(B), which defines a "free appropriate public education" as, *inter alia*, one that "meet[s] the standards of the State educational agency." We disagree. Since it is the State—and not the disabled child's parents—that must provide a free appropriate public education, it follows that it is the State, and not the parents, that must ensure that the standards in Section 1401(a)(18)(B) of the Act are met. This conclusion is confirmed by Section 1413(a)(4)(B) of the Act, which states that, when a State places a disabled child in a private facility "as the means of carrying out the requirements of this [statute]," the State must determine whether the facility meets "standards that apply to State and local educational agencies." The statute places no parallel obligation on parents who elect to enroll their children in a private school pending the outcome of their challenge to the State's educational plan. In sum, since parents are under no statutory obligation to ensure that their child's education meets the specific standards in Section 1401(a)(18)(B), they cannot be barred from obtaining relief that would otherwise vindicate the Act solely because of failure to comply with those standards.

We thus agree with the courts below that neither lack of state approval of a private school for placement of children under IDEA, nor the school's failure to qualify for such approval, constitutes, in itself, a bar to an award to parents of tuition reimbursement. The rationale underlying *Burlington*'s holding is that parents who "elect to risk shouldering the costs of what they perceive to be a more appropriate placement, and whose judgment is * * * vindicated by the district court, should receive more than an 'empty victory.'" *Alamo Hgts. Ind. Sch. Dist.* v. *State Bd. of Educ.*, 790 F.2d 1153, 1161 (5th Cir. 1986) (citing *Burlington*, 471 U.S. at 370). In this case, Shannon's parents have been vindicated in their judgment that the

placement offered by petitioners was inadequate, and in their belief that the private school placement they chose would provide an appropriate education for their child. Petitioners do not challenge the district court's conclusion that Trident Academy provided Shannon with "an appropriate education"—one that was "in substantial compliance with all the substantive requirements" of IDEA—which is a prerequisite to reimbursement under *Burlington*, 471 U.S. at 369, 373-374. See Pet. App. 29a, 37a, 10a n.2; Br. in Opp. 14-15; Pet. Reply Br. 5. In the circumstances of this case, the award of tuition reimbursement is necessary "to make good the wrong done." *Franklin* v. *Gwinnett County Public Schools*, 112 S.Ct. at 1033 (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)). If that award is barred, respondent will have received an "empty victory"—a result contrary to the congressional intent that this Court has recognized.[12]

b. Petitioners claim (Pet. 17) that the court of appeals' decision upholding the remedy in this case is in square

[12] That is not to say, however, that such reimbursement is required in every case of a State's default under IDEA. In *Burlington*, 471 U.S. at 374, the Court indicated that "equitable considerations are relevant in fashioning relief" to parents requesting reimbursement under the Act. In our view, a court may take into account such factors as the overall reasonableness of the parties' conduct (cooperativeness, good faith, efforts to comply with the statute and regulations, procedural errors) and the parents' efforts to cooperate with the State in choosing an appropriate private placement (including whether parents arbitrarily reject placement in schools approved by the State in favor of an institution, for example, that is considerably more expensive than the state-approved schools, or that provides significantly more elaborate services than the statute requires the State to provide). See, *e.g.*, *Tucker* v. *Bay Shore Union Free School Dist.*, 873 F.2d 563, 568 (2d Cir. 1989); *Alamo Hgts. Ind. Sch. Dist.*, 790 F.2d at 1161; *Town of Burlington* v. *Department of Educ.*, 736 F.2d 773, 801-802 (1st Cir. 1984), aff'd, 471 U.S. 359, 374 (1985); *Carrington* v. *Commissioner of Education*, 404 Mass. 290, 297 (1989). In this case, the equitable factors, on balance, favor relief for respondent.

conflict with the Second Circuit's decision in *Tucker* v. *Bay Shore Union Free School Dist.*, 873 F.2d 563 (2d Cir. 1989). Because the court of appeals' analysis in this case is inconsistent with the reasoning, but not necessarily with the result, in *Tucker*, there is no need for the Court to review the reimbursement issue at this time.

In *Tucker*, parents dissatisfied with a school district's proposed plan for educating their disabled child enrolled the child in a private school. The court of appeals upheld the district court's determination that the school district had defaulted on its obligation to provide a "free appropriate public education" under IDEA, and that the parents' alternative private placement was "appropriate to meet [the child's] educational needs." 873 F.2d at 564. The district court refused to award the parents reimbursement for the cost of the private school, however, because the institution was "not on the state's 'approved list' of private schools eligible to contract with the state for the education of [the] handicapped." *Id.* at 566. The court of appeals upheld the denial of reimbursement. The "basis for this result," the court explained, is IDEA's "requirement that handicapped children be educated at public expense only in those private schools that meet [s]tate educational standards." *Id.* at 568 (citing Section 1401(a)(18)(B)).[13] The court concluded, contrary to the court of appeals' reasoning in this case, that the statute "does not empower the district court to award reimbursement" to parents unless the private placement "meet[s] the standards of the State educational agency." 873 F.2d at 568.

Although the *Tucker* court indicated that the obstacle to the award of tuition reimbursement in that case was the

[13] The court noted that the private school's unapproved status "was at least in part the consequence of its unwillingness to follow the state approved curriculum or to admit emotionally disturbed students," as the State required. 873 F.2d at 564 n.1.

private school's failure to meet state educational standards under Section 1401(a)(18)(B) (which requirement the court below refused to impose as a prerequisite to reimbursement), the Second Circuit had no occasion to decide whether a different result would obtain if, as in this case, the State maintained no list of approved private schools and did not otherwise provide a mechanism for obtaining approval or verifying compliance with state standards. Likewise the court of appeals in this case did not confront the issue of whether a court could deny reimbursement for tuition expenses incurred at a private school chosen by parents that did not meet state standards if the parents had available to them a list of schools approved by the State. Although the court of appeals in this case suggested that reimbursement would not necessarily be barred in those circumstances, it did not rule out the possibility that, in a particular case, a court could deny reimbursement on equitable grounds to parents who decline to enroll their child in an approved school. See note 12, *supra*.

Because this case and *Tucker* sharply diverge on the facts, this Court could decide the reimbursement issue in this case without definitively resolving the question of statutory construction on which the courts of appeals disagree. That consideration counsels hesitation in granting review in this case. Nevertheless, because the court of appeals itself acknowledged (Pet. App. 15a-16a) that its decision is in conflict with *Tucker* on the underlying issue of the scope of statutory authority to grant reimbursement, the Court may wish to address the issue at this time.

CONCLUSION

The petition for a writ of certiorari may appropriately be denied. Alternatively, if the Court determines to grant certiorari, it should be limited to question 1.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

AMY L. WAX
Assistant to the Solicitor General

WILLIAM KANTER
JOHN P. SCHNITKER
Attorneys

JANUARY 1993

No. 91-1523

In the

Supreme Court of the United States

October Term, 1990

Florence County School District Four, et al.

Petitioners,

v.

Shannon Carter, By and Through Her Father and Next Friend, Emory Carter

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GWENDOLYN H. GREGORY
Counsel of Record

NSBA Deputy General Counsel
1680 Duke Street
Alexandria, VA 22314
(703) 838-6712

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

APR 24 1992
OFFICE OF THE CLERK

TABLE OF CONTENTS

page

INTEREST OF AMICUS CURIAE..... 1

REASONS FOR GRANTING THE WRIT 2

STATEMENT OF THE CASE 3

ARGUMENT

I. The lower courts' decisions will result in school districts diverting financial support from important public education programs into private education, even where an "appropriate" education can be provided in the public schools..... 4

II. Contrary to Congress' intention in passing the IDEA and in direct disregard of this Court's rulings, the courts below have assumed the role of educational decisionmakers and ordered a local school district to pay for an educational placement that does not meet State educational standards..... 7

III. This era of educational reform in the country is a particularly critical time for the courts to restrain themselves from interfering with local educational policymaking..... 24

IV. Conclusion..... 29

TABLE OF AUTHORITIES

CASES:

Abington School District v. Schempp, 374 U.S. 203, 300-301 (1963)..... 17

Board of Education of Community Consolidated School District 21 v. Brozer, 938 F.2d 712 (7th Cir. 1991), cert. denied, 111 S.Ct. _____ (1992)..... 7

Board of Educ. of Hendrick Hudson Central School District v. Rowley, 458 U.S. 175 (1982)..... 8-9,18, 27-28,29

Burlington School Committee v. Dept. of Educ., 171 U.S. 359 (1985)..... 10

Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990)..... 22

Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990)..... 22

Doyle v. Arlington County School Bd., 953 F.2d 100 (4th Cir. 1991)..... 23

Epperson v. Arkansas, 393 U.S.97 (1968).. 16

Landau v. Long Beach, 947 F.2d 950 (9th Cir. 1991)..... 23

Mercer v. Michigan State Board of Education, 379 F.Supp. 580 (E.D. Mich.) aff'd mem. 419 U.S. 1801 (1974)..... 17

Milliken v. Bradley, 418 U.S. 717 (1974).. 7

Tatro v. Texas, 703 F.2d 823 (5th Cir. 1982), aff'd in part, rev'd in part, on other grounds, sub nom.. Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984)..... 22

LEGISLATIVE AUTHORITIES:

Department of Education Organization Act, 20 U.S.C. 3401..... 15-16

Individuals with Disabilities Education Act 20 U.S.C. § 1401 et seq. ..... passim

S. Rep. No. 168, 94th Cong., 1st Sess. 11 (1975)..... 11

121 Cong. Rec. S. 10961 (daily ed. June 18, 1975)..... 11-12

OTHER AUTHORITIES:

A Nation at Risk: The Imperative for Educational Reform., U.S. Department of Education, 1983..... 25

Cost of Education, Glen E. Robinson and Nancy J. Protheroe (Education Research Service)..... 6

High School: A Report on Secondary Education in America, Ernest Boyer, The Carnegie Foundation for the Advancement of Teaching, 1983..... 25

Making the Grade, Twentieth Century Fund..... 25

Statement of the Ad Hoc Coalition to Increase Federal Funding for the Education of Children with Disabilities, National School Boards Association, American Association of School Administrators, Council for Exceptional Children, National Association of State Directors of Special Education, National Association of State Boards of Education and National Parent Network on Disabilities (Spring, 1992)..... 5

State Strategies for Achieving the National Education Goals, National Governors Association Task Force on Education (July 28, 1990)..... 26

Survey, National Association of State Directors of Special Education..... 5

Time for Results: The Governors' 1991 Report on Education. Washington, DC, National Governors Association Center for Policy Research and Analysis, 1986... 26

U.S. Dept. of Education, Justification of Appropriation Estimates to the Congress Fiscal Year 1993 (1992)..... 4

No. 91-1523

In the

Supreme Court of the United States

October Term, 1991

Florence County School District Four, et al.

Petitioners,

v.

Shannon Carter, By and Through Her Father and Next Friend, Emory Carter

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Each of the 16,000 school districts which NSBA represents receives or is eligible to receive financial assistance under the Individuals with Disabilities Education Act 20 U.S.C. § 1401 et seq. (IDEA or the Act). The subject of this case is of great importance to school districts across the country from both an educational and financial perspective.

REASONS FOR GRANTING THE WRIT

The courts below have sidestepped the carefully crafted process established by Congress in the IDEA to ensure that every child with a disability receives a "free appropriate public education" (FAPE) and, instead, contrary to the explicit rulings of this Court, have substituted their own judgment for that of South Carolina's Department of Education and the local school officials.

STATEMENT OF THE CASE

Amicus incorporates by reference thereto the statement of the case contained in Petition for Certiorari.

ARGUMENT

I. The lower courts' decisions will result in school districts diverting financial support from important public education programs into private education, even where an "appropriate" education can be provided in the public schools.

This case is extremely important to school districts across the country because of its financial implications. Private schools

are usually substantially more expensive than public placements, particularly when compared to a "mainstreamed" or partially mainstreamed public environment. When the Education of the Handicapped Act (now Part B of IDEA) was passed in 1975, Congress made the commitment to provide states with 40% of the national average per pupil expenditure for each eligible child to be used to defray the "excess costs" associated with meeting the educational needs of a child with a disability. Unfortunately, Congress has never come close to meeting that promise. Funding for the program has never exceeded 12% of the national average per pupil expenditure -- currently funding equals only 7%. U.S. Dept. of Education, Justification of Appropriation Estimates to the Congress Fiscal Year 1993 at F-19 (1992). Special education expenditures have risen from approximately $11.75 billion in 1982-83 to over $16 billion in 1986-87, with the federal government picking up only

slightly more than $1 billion. Statement of the Ad Hoc Coalition to Increase Federal Funding for the Education of Children with Disabilities, issued Spring, 1992 by the National School Boards Association, American Association of School Administrators, Council for Exceptional Children, National Association of State Directors of Special Education, National Association of State Boards of Education and National Parent Network on Disabilities.

A survey of 18 states conducted by the National Association of State Directors of Special Education showed that although the number of special education students increased from approximately 6% over the period from fiscal 1985 to fiscal 1991, state special education expenditures increased in those states by nearly 70%. The cost of private placements was a major contributor to this increase.

The combination of inordinate expense of special education together with the increase in societal pressures on the educational system (e.g. the increase in families living in poverty,[1] the effects of alcohol/drug dependency and the increase in populations of immigrants[2]) together with a higher increase in the inflation rate for schools[3] threatens to overload the public education system in many states and localities.

The case at bar is not the only example of courts giving parents a veto power over the placement of their child. For example, a court of appeals recently held that even where the school district adopts an "appropriate"

---

[1] In 1985, 12.5 million children were classified as living in poverty. The proportion has risen from 1 in 8 during the 1970s to 1 in 5.1. Cost of Education, published by Education Research Service, Glen E. Robinson and Nancy J. Protheroe, page 82.

[2] Projections show the number of limited English proficient children (ages 5 to 14) increasing 16.7% between 1980 and 1990, and increasing 41.7% between 1980 and 2000. Id.

[3] A School Price Index, developed in 1975, demonstrated a more rapid rate of inflation for the special mix of goods and services unique to education for the period from 1975 to 1986 than the Consumer Price Index, 132.4 points as compared to 110.1 points. Id. at 27.

educational program for the child and follows all procedural requirements to the letter -- the school district must pay for the private school placement of the child if parents evidence sufficient hostility to the state placement. Board of Education of Community Consolidated School District 21 v. Brozer, 938 F.2d 712 (7th Cir. 1991), cert. denied, 111 S.Ct. _____ (1992).

II. Contrary to Congress' intention in passing the IDEA and in direct disregard of this Court's rulings, the courts below have assumed the role of educational decisionmakers and ordered a local school district to pay for an educational placement that does not meet State educational standards.

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process . . . .

Milliken v. Bradley, 418 U.S. 717, 741 (1974).

NSBA, speaking for school districts across this land, is deeply concerned about

the implications of the lower courts' decisions in the instant case, on the traditional control of local and state educational officials over public education.

Congress did not intend when it passed the IDEA to transfer control over substantive educational policy decision from public school officials to the courts. Instead it is a grant statute setting out broad procedural mechanisms to assure that appropriate educational programs are provided to children with disabilities.

This Court, too, in its first case to interpret the Act, stated:

> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.
>
> * * *
>
> We previously have cautioned that courts lack the 'specialized knowledge and experience' necessary

> to resolve 'persistent and difficult questions of educational policy.' [Citation omitted.] We think that Congress shared that view when it passed the Act. . .
>
> Entrusting a child's education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies . . . and in the formulation of the child's individual educational program. . .

Board of Educ. of Hendrick Hudson Central School District v. Rowley, 458 U.S. 175, 207-208 (1982).

The purpose of the Act is to ensure that each child with a disability, as defined under the statute, receives a "free appropriate public education." The statute includes a number of affirmative requirements relating to the evaluation of the child, consultation with parents and educational experts, development of an individualized education program (IEP) and, finally, specific due process

requirements. The rights guaranteed under the IDEA are uniquely educational in nature.

Congress carefully crafted the administrative procedures under the IDEA to ensure that parents, the school district, teachers and other specialists work together to design an "appropriate" educational program for the child, to determine the child's unique educational needs, an appropriate placement to meet those needs, and the "related services" supporting them.

The requirement that the school district adopt an IEP for each child with a disability is the "modus operandi of the Act. Burlington School Committee v. Dept. of Educ., 171 U.S. 359, 368 (1985). Under the Act an eligible child with a disability has the right to be evaluated periodically by a group of experts to determine the child's individual educational needs and to set individual goals for that child. Parents have substantial input into the process through notice at every

stage, the right to obtain an independent evaluation which the school district must review, and ultimately, the right to a hearing where there is a dispute. Congress intended the IEP process to be a continuing cooperative process between the experts in the school district and the parents of the child with a disability.[4] Consistent with this intent, the

---

[4] [It is the method] of involving the parent and the handicapped child in the provision of appropriate services, providing parent counseling as to ways to bolster the educational process at home, and providing parents with a written statement of what the school intends to do for the handicapped child.

. . . [T]he Committee intends to ensure adequate involvement of the parents or guardian of the handicapped child, and the child (when appropriate) in both the statement and its subsequent review and revision . . . By changing the language of this provision to emphasize the process of parent and child involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child."

S. Rep. No. 168, 94th Cong., 1st Sess. 11 (1975).

During debate on the Act the sponsors discussed the IEP conference at length. Senator Stafford, for example, stated:

IEP in this case stated that the parents could request that the district convene an IEP conference at any time. The parents chose not to do so.

The courts below, ignoring this Court's warnings about judicial involvement in

---

Continued from previous page.

> [A]n extremely important aspect is the requirement that each handicapped child will have individual planning conferences. The participants will include the parents, the teacher, and a qualified supervisor or provider of special education services. . . An additional benefit that will result from these conferences is one that is too often overlooked. Not only will the child be better served, and the parents better informed of the limitations their child has due to a particular handicap, but the teacher will learn from this experience as well.
>
> As we look more and more toward children with handicaps being educated with their "normal" peers, we must realize, and try to alleviate the burden put upon the teacher who must cope with that child and all the others in the class as well. The teacher needs reinforcement and a better understanding of the child's abilities and disabilities.
>
> It is hoped that the participation in these conferences will have a positive effect on the attitude of the teacher toward the child and an understanding of the child's problems in relating to his or her peers because of a handicapping condition.

121 Cong. Rec. S. 10961 (daily ed. June 18, 1975).

educational decisions, have subverted this process by invalidating the school district's IEP based on an inherently educational judgment and then deferring to the parents' wishes while dismissing state educational standards as important but not crucial to an appropriate education. Appendix to Petition 19a.

The decision of the courts below will make it impossible for school districts to perform their function. If the district meets its responsibility to actively consider the parents' concerns at the IEP level and adopts goals recommended by the parents' own expert -- and the parents later change their minds -- the school district can be deemed by the court to have failed in its statutory obligations for not having adopted different goals. If the parents unilaterally place their child in a private school and, after a number of years, the child successfully completes her education -- the school district by virtue of its

alleged default on its statutory duty is forced to pay for the private education. If the state adopts standards for all education in the state, the courts are allowed to ignore the standards as long as the child is deemed to have succeeded in the private setting.

The precedent established by the lower courts' decisions disregards the teachings on local control of education, of every decision of this Court. Under the guise of the IDEA, the courts usurped the traditional control of public school officials and assumed the role of educational decision-maker. In this case the school district set educational goals for a child based on specific suggestions of the experts for the parents and offered the child itinerant services in response to the parents' rejection of a more intensive resource room placement; the parents accepted the IEP and the child progressed to the next grade under the plan. Both the local and the state hearing officers upheld the IEP against the

parents' challenges. Nevertheless, the courts, based solely on their own evaluation of the goals in the plan -- not the adequacy of the placement -- decided that the district's placement was inappropriate in light of the school district's so-called failure to meet its obligations under the IDEA and ordered the school district to reimburse the parents for the costs of a placement which does not meet the standards set by the state for the education of all children within their jurisdiction.

In contexts unrelated to the IDEA, this Court has repeatedly emphasized the primacy of State and local educational authorities in determining issues of educational policy.[5] In

---

[5] The U.S. Congress has also expressly voiced its commitment to local control over educational policy. The most recent expression of that commitment appears in the Department of Education Organization Act, 20 U.S.C. 3401. That act provides in Section 103:

> (a) It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to

Epperson v. Arkansas, 393 U.S. 97, 104 (1968) the Court stated:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and

---

Continued from previous page.

> strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the State.
>
> (b) No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.

> sharply implicate basic constitutional values.

Earlier, in Abington School District v. Schempp, 374 U.S. 203, 300-301 (1963) (Brennan J., concurring), Justice Brennan issued the following words of caution:

> We should heed Mr. Justice Jackson's caveat that any attempt by this Court to announce curricular standards would be "to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and servicing highly localized groups which not only differ from each other but which themselves from time to time change attitudes." Illinois ex rel. McCollum v. Board of Education, supra, [333 U.S.] at 237.

This deference to local control is a recognition of the varying wants and needs of the Nation's diverse and varied communities, each with its unique character, standards and sense of social importance of a variety of values. Mercer v. Michigan State Board of Education, 379 F.Supp. 580, 585 (E.D. Mich.) aff'd mem. 419 U.S. 1801 (1974).

This Court clearly reaffirmed its deferential approach on educational issues in its decision in Board of Educ. of Hendrick Hudson Central School District v. Rowley, supra. This Court held that courts, in assuring that the requirements of the IDEA (then the Education for All Handicapped Children Act) are met, must avoid imposing their view of preferable educational methods upon states. That, however, is exactly what the courts in the instant case have done.

First, in declaring the public placement to be inappropriate for the child's needs, the courts below summarily rejected the IEP developed by the school district and initially approved by the parents, because of the courts' belief that the goals in the plan were not sufficiently high. The courts took the goals out of the context of the whole education plan, focusing instead on the conclusion that the goals were insufficient to assure that the child progressed from grade to

grade, although the parents' expert had suggested limited goals as a means to preserve and encourage the child's self esteem. Furthermore, by putting undue emphasis on its view that a four month goal is insufficient to assure educational progress, the courts ignored the reality, i.e., that the child's test scores improved in the public placement to the extent that she was able to progress to the next grade at the end of the school year.

The lower courts also ignored the fact that the parents could have by the express terms of the IEP requested that the goals be amended for the next school year, but instead chose to enroll her in a private school and request a hearing solely on the placement issue. The appeals court quite erroneously characterizes this case as one in which "the parents are forced by the school system's violation of the Act to unilaterally withdraw the child from the public schools and, on their own seek alternative schooling." The

only basis the court cites for the school district's "violation" of the Act is the educational goals which were limited at the suggestion of the parents' own social worker. It is difficult to imagine how the inclusion of these easily amendable educational goals constitutes a default on the part of the school district of its responsibility to provide an appropriate placement for the child, especially when there is no evidence that the school district was rigidly wedded to the goals; in fact, the school district was open to requests at any time to re-evaluate them.

Second, the courts held the private placement to be "appropriate," even though it did not meet state educational standards. The courts justified this ruling on the basis that the child progressed from grade to grade, and thereby satisfied the Rowley standard of providing some educational benefit. The courts refused to accept the school district's

IEP as appropriate allegedly because the goal of four months progress a year would not have allowed the child to achieve a level comparable to the one attained in the private school. The comparison drawn by the courts is inapposite for several reasons. First, the courts seem to make the educational assumption for which they provide no basis that the goals set in the child's IEP would have controlled her actual progress and limited her achievement level to four months per year. Second, the courts contrast the goals set for the second year of the IEP with the student's actual achievement level three years later and conclude that the public placement was inappropriate.

This approach puts the onerous burden on the school district of disproving the court's baseless educational projections about the probable outcome of the IEP in the face of after-the-fact evidence of the success of the private school placement. The imposition of

such a burden is contrary to the rulings of several circuit courts. These circuit courts have held, and amicus submits that these courts are correct, that the party challenging the IEP should have the burden of proving that the educational placement established by the IEP is not appropriate.

> "We are convinced that the central role of the IEP in the educational scheme contemplated by the EAHCA and in the standard of review developed in Rowley gives rise to a presumption in favor of the educational placement established by [the child's] IEP. Moreover, because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate."

Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1982), aff'd in part, rev'd in part, on other grounds, sub nom.. Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984). See, also, Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990); Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990); Landau v. Long Beach, 947

F.2d 950 (9th Cir. 1991); Doyle v. Arlington County School Bd., 953 F.2d 100 (4th Cir. 1991). In the instant case it is the parents who challenged the IEP but the lower courts clearly did not place the burden of proof on the parents. In Rowley, this Court said, "the fact that section 1415(e) requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to these proceedings."

Finally, the lower courts' determination that the private school is an appropriate placement and "proper under the Act," a condition required by this Court for reimbursement, is troublesome because it ignores the Act's explicit requirements encompassed within the definition of "free appropriate education." Here, the education offered by the private placement met neither the requirement of following the IEP procedures under the Act, nor the "standards

of the State educational agency." 20 U.S.C. 1401 (a)(18)(B) and (D). Under their interpretation of the IDEA, whether a private placement itself qualifies as a FAPE becomes unimportant once it has been deemed that the school district failed to provide an appropriate educational placement.

III. This era of educational reform in the country is a particularly critical time for the courts to restrain themselves from interfering with local educational policymaking.

The state standards that the courts below so lightly dismiss are not adopted lightly by the states. All states have standards for accreditation of schools and school districts, both public and private. Some states require certain minimum pupil-teacher ratios to be met before a school or district will be accredited. Most states require establishment of guidance and counseling programs with certain specified staff requirements relating to certification, pupil-counselor ratios, etc. All but two states require that teachers be

certificated as a prerequisite to employment. In order to meet the credentials requirement teachers must meet standards relating to level of higher education, experience (e.g. student teaching), morality, health, citizenship etc. Credentials can also be revoked upon certain grounds, such as failure to meet continuing education requirements, false statements on applications or failure to meet standards of morality (e.g. a finding that an employee is guilty of child abuse.)

In recent years there has been a national push to raise standards in the public schools for both employees and students. This "educational reform" movement began in 1983 with the issuance of three reports, the U.S. Department of Education's A Nation at Risk, the Twentieth Century Fund's Making the Grade, and the Carnegie Foundation's High School: A Report on Secondary Education. President Bush ran for election on a platform of "The Education President" and in 1990 issued his

National Education Goals. All of these reports urge states, local school districts, state legislatures and the public to work together to reform public education so as to make the system more effective in assuring that this country will be able to compete in the world of the next century.

On July 28, 1990 the National Governors' Association Task Force on Education issued a report on State Strategies for Achieving the National Education Goals. The governors' goals had been established in 1986. National Governors Association Center for Policy Research and Analysis, Time for Results: The Governors' 1991 Report on Education. Washington, D.C., National Governors Association. The goals covered topics such as decreasing the dropout rate, demonstration of competency in certain core subjects, upgrading teaching, etc. The strategies include subjects such as the development of new forms of performance assessment for licensure of

teachers and administrators, accountability for colleges and universities for pass rates on licensure examinations, alternative routes to licensure.

Educational policymakers at all levels of government are currently expending a great deal of time, thought, debate and financial resources in improving educational standards. Yet the courts below reject all that in favor of their own standards developed in the context of one case involving one child with a disability.

The IDEA was designed to assure "access" to a publicly financed education. It was not designed to mandate that public school districts finance the education that the parents of a child with a disability and the courts deem is best for the child at the expense of compliance with state education standards. That standard was expressly rejected by this Court in Rowley.

> Congress' desire to provide specialized educational services, even in furtherance of "equality," cannot be read as imposing any particular substantive educational standard upon the States.
>
> The [lower courts] erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

458 U.S. at 200-201.

Like the lower courts in Rowley, the lower courts here also are attempting to impose a standard of what is "best" for the child. Based on their conclusion that the goals were insufficient, the courts overturned the entire IEP in favor of a private institution that does not meet state education standards.

The rule of law established by these courts is that parental choice of placement

prevails in the absence of a showing that the child is not succeeding in the placement. And, as long as the parents are satisfied with the placement, the courts resist second-guessing their view on "success." They will, however, readily second-guess or ignore the judgment of state and local educational officials.

CONCLUSION

The decision below imposes great financial costs and raises other severe problems for the continued operation of school districts throughout the United States. Both lower courts have ignored the clear words of the statute, the teachings of this Court in cases such as Board of Educ. of Hendrick Hudson Central School District v. Rowley, supra, and the educational standards and policies of state and local education officials -- and deferred instead to the parents' desire to remove the child from the public schools in favor of a private setting.

School boards across the country urge this Court to grant review in this case and to preserve the traditional role of state and local school authorities by reversing the decision of the Fourth Circuit.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association (NSBA)
1680 Duke Street
Alexandria, VA 22314
(703) 838-6712

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

FILED
JAN 29 1992

(4)

No. 91-1523

In The
Supreme Court of the United States
October Term, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR, et al.,
Petitioners
v.
SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,
Respondents

On Writ of Certiorari
to the
United States Court of Appeals
for the
Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Douglas F. Bates
(Counsel of Record)
250 East 500 South
Salt Lake City, Utah 84111
(801) 538-7832

Counsel for the National Association of State Boards of Education as Amicus Curiae

12

No. 91-1523

In The
Supreme Court of the United States
October Term, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR, et al.,
Petitioners
v.
SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,
Respondents

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

The National Association of State Boards of Education hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the Counsel for Petitioners has been obtained. The consent of the Counsel for Respondents was requested but refused.

The interest of the National Association of State Boards of Education in this case arises from the fact that the decision below reduces the legal significance of State Board of Education determinations in establishing standards for the education of children with disabilities and for the expenditure of funds for the education of such children under the Individuals with Disabilities Act, 20 U.S.C. §§ 1401 *et. seq.*

Because the Court of Appeals held that a learning disabled child's parents are entitled to State reimbursement even where a unilateral private placement does not meet State education standards, those standards are rendered meaningless to private schools which indirectly receive State funding under the Act. The brief which *amicus curiae* is requesting permission to file

will contain a discussion of both the legal and economical ramifications of such a holding.

Respectfully submitted,

Douglas F. Bates
(Counsel of Record)
250 East 500 South
Salt Lake City, Utah 84111
(801) 538-7832
Counsel for the National Association of State Boards of Education as Amicus Curiae

TABLE OF CONTENTS

Interest of the Amicus Curiae Page 1

Summary of the Argument Page 2

Argument: Reasons for Granting the Writ Page 3

1. There is a Conflict Among the Circuits Concerning the Application of Decisions of This Court and of Federal Law and Regulation in the Education of Children with Disabilities Page 3

2. The Decision of the Fourth Circuit Conflicts with Principles of Local Control and the Need for Schools to have a Reasonable Measure of Control over School Budgets, Planning, and Operations As Set Forth in Previous Decisions of this Court Page 5

3. The Decision of the Fourth Circuit is Contrary to the Best Interests of Students, In That It May Serve as a Disincentive to Private Schools to Comply with Standards Established by State Education Authorities for the Education of Children with Disabilities Page 6

Conclusion Page 7

TABLE OF AUTHORITIES

CASES

Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986) Pages 2, 4

Board of Education of Community Consolidated School District No. 21 v. Illinois State Board, 938 F.2d 712 (7th Cir. 1991) Page 6

Burlington School Committee v, Massachusetts Department of Education, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed. 385 (1985) Pages 2, 5

Carter v. Florence County School District Four, 950 F.2d 156 (4th Cir. 1991) Pages 4, 5, 6

Martinez v. Bynum, 103 S.Ct. 1838, 75 L.Ed.2d 879 (1983) Page 5

Mrs. C. v. Wheaton, 916 F.2d 69 (2d Cir. 1990) Page 4

Tucker v. Bay Shore Union Free School District, 873 F.2d 563 (2d Cir. 1989) Page 3

FEDERAL LAW AND REGULATION

Individuals With Disabilities Education Act, 20 U.S.C. § 1400, *et. seq.*; regulations at 34 CFR § 300 *et. seq.* *Pages 3, 4*

OTHER

National Association of State Directors of Teacher Education and Certification, *Manual on Certification and Preparation of Educational Personnel in the United States*, Kendall Hunt Publishing Co., 1991 Page 7

Schrag, Dr. Judy, Director, Office of Special Education Programs, U.S. Department of Education, *Opinion Letter to William J. Reedy, Esq., Vermont State Department of Education*, August 24, 1990 Page 3

No. 91-1523

In The
Supreme Court of the United States
October Term, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR, et al.,
Petitioners
v.
SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,
Respondents

On Writ of Certiorari
to the
United States Court of Appeals
for the
Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The *National Association of State Boards of Education* (NASBE) is a nonprofit, private association that represents State and territorial boards of education in national affairs and assists those boards in the fulfillment of their duties. NASBE's principal objectives are to strengthen State leadership in education policymaking, promote excellence in

the education of all students, advocate equality of access to educational opportunity, and assure responsible lay governance of public education.

NASBE's interest in this case arises from concern about the apparent willingness of the United States Court of Appeals for the Fourth Circuit to set aside the authority of States and State Boards of Education to establish and enforce reasonable standards for education, in contravention of traditional understandings of the respective roles of federal, State, and local governments in governance of education, and in apparent violation of the intent of relevant Congressional policies and previous pronouncements of this Court. If the position of the Fourth Circuit is upheld, it would appear that State and local boards of education will have become largely irrelevant in planning and providing educational services to a large group of students in the United States, leaving those bodies solely with the responsibility to fund programs which parents unilaterally select without regard for established standards.

NASBE supports the provision of high quality educational services for all of the children of the nation, regardless of the presence of handicapping conditions. NASBE believes, however, that the decision of the Fourth Circuit is contrary to that goal, and supports the request of Petitioners that this Court accept and reconsider the decision below in this case.

Petitioner has consented to the filing of this brief.

ISSUES PRESENTED FOR REVIEW

1. There is a conflict among the Circuits on this question concerning the application of a decision of this Court, *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed. 385 (1985), as well as federal law and regulation in the education of children with disabilities. The decision of the Fourth Circuit in the instant case appears to have at least some support under a decision by the Fifth Circuit, *Alamo Heights Independent School District v. State Board of Education*, 790

F.2d 1153 (5th Cir. 1986), but is in direct conflict with a decision by the Second Circuit, *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563 (2d Cir. 1989).

2. The decision of the Fourth Circuit conflicts with principles of local control and the need for schools to have a reasonable measure of control over school budgets, planning, and operations as set forth in previous decisions of this Court.

3. The decision of the Fourth Circuit is contrary to the best interests of students, in that it may serve as a disincentive to private schools to comply with standards established by State education authorities for the education of children with disabilities.

ARGUMENT: REASONS FOR GRANTING THE WRIT

1. THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICATION OF DECISIONS OF THIS COURT AND OF FEDERAL LAW AND REGULATION IN THE EDUCATION OF CHILDREN WITH DISABILITIES

The Individuals with Disabilities Education Act (IDEA) requires States to ensure that funds received from the federal government for education of children with disabilities be used "only in a manner consistent with the goal of providing a free appropriate public education for all children with disabilities," 20 U.S.C. § 1413(a)(2). The term, "free appropriate public education," is defined in 20 U.S.C. § 1401(a)(18) as special education and related services that, among other things, "meet the standards of the State educational agency," and "are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

The requirement that standards be met was reinforced in an opinion letter of Dr. Judy A. Schrag, Director, Office of Special Education Programs, U.S. Department of Education, dated August 24, 1990, addressed to William J. Reedy, Esq.,

Legal Counsel for the Vermont State Department of Education: "[E]ach State educational agency (SEA) must ensure that all educational programs for children with disabilities in the State meet State education standards and EHA-B requirements. 34 CFR § 300.600(a)(2)(ii). Thus, based on the above requirements, the Vermont Department of Education must ensure that private schools or facilities in which children with disabilities are publicly-placed or referred meet EHA-B requirements, including the standards that apply to State and local education agencies." The letter goes on to state that, in developing standards applicable to private schools serving students with disabilities, the requirements may not be implemented in a manner that overrides the requirements of EHA-B.

In the instant case, the private school receiving the unilateral placement by the parent did not meet State standards; among other things, the teachers did not hold teaching certificates for special education, and at least one of the student's teachers held no certificate at all. In addition, the school did not prepare individualized education programs for its students. In fact, the court below found that the school in question did not even "attempt to comply with the terms of the Act." *Carter v. Florence County School District Four*, 950 F.2d 156, 161 (4th Cir. 1991). The court below justified its suspension of the standards by restricting the application of that requirement to cases where a student was placed by a public educational agency, *Carter* at 162. We note first our view that once public funds are committed to a placement, it becomes a public placement. Even without that, however, we do not believe that Congress intended to make the rights of disabled children dependent upon the status of the placing party. Children's rights should be protected regardless of the acting party. "The EHA procedural safeguards begin with the individualized education program (IEP)." *Mrs. C. v. Wheaton*, 916 F.2d 69 (2nd Cir. 1990).

The decision of the Fifth Circuit in *Alamo Heights* required a school district to pay for a non-qualifying summer program, but in that case the school district had declined to provide any

program at all, *Alamo Heights*, at 1161. In the instant case, the school district had offered at least two appropriate placements within the district's schools, *Carter*, at 158 and 159.

The decision of the Second Circuit is in direct conflict with the decision below: "We must respectfully decline to follow the *Tucker* decision." *Carter*, at 163.

Among other things, the three Circuits disagree on the application of this Court's decision in *Burlington*, see *Carter* at 163, *Tucker* at 568, and *Alamo Heights* at 1161. If <u>every</u> program receiving funds through IDEA is required to meet standards established by IDEA and the States, then the decision in *Carter* is incorrect. If <u>no</u> program is required to meet those standards, then IDEA and related State and federal regulation will require major revisions. If only <u>some</u> programs, but not others, are required to meet those standards, then the decision of the Second Circuit in *Tucker* is incorrect, and State and local education agencies, along with parents and other advocates for the educational rights of children with disabilities, will need to receive guidance concerning the criteria to be followed in funding programs which are unable or unwilling to meet current federal and State standards.

2. THE DECISION OF THE FOURTH CIRCUIT CONFLICTS WITH PRINCIPLES OF LOCAL CONTROL AND THE NEED FOR SCHOOLS TO HAVE A REASONABLE MEASURE OF CONTROL OVER SCHOOL BUDGETS, PLANNING, AND OPERATIONS AS SET FORTH IN PREVIOUS DECISIONS OF THIS COURT.

In addressing a Texas residence requirement for free public education, this Court noted, "The provision of primary and secondary education, of course, is one of the most important functions of local government. Absent residence requirements, there can be little doubt that the proper planning and operation of the schools would suffer significantly. The State thus has a substantial interest in imposing bona fide residence requirements to maintain the quality of local public

schools." *Martinez v. Bynum*, 103 S.Ct. 1838, 1843, 75 L.Ed.2d 879 (1983).

Requirements restricting funding of education programs to those that meet educational standards are very closely related to residence requirements. If parents are able to ignore educational standards and procedural requirements as in this case, moving their children unilaterally to private placements at State or local education agency expense despite the availability of appropriate programs within the school district, then the ability of local and State governments to enforce reasonable control over education, including planning, operations, and management of budgets, will be significantly eroded. In this case, the parent disagreed with appropriate placements and prevailed in obtaining an inappropriate placement; in another recent case, a court allowed a parent to pursue a private, unilateral placement at public expense despite the court's clear finding that the public school program was appropriate, simply because the parent was "hostile" towards the public school system and placement, *Board of Education* of *Community Consolidated School District No. 21 v. Illinois State Board*, 938 F.2d 712 (7th Cir. 1991). We do not wish to be alarmists, but we fear that such decisions are seriously infringing upon the ability of the public school system to manage its affairs and provide predictable and effective services for children.

3. THE DECISION OF THE FOURTH CIRCUIT IS CONTRARY TO THE BEST INTERESTS OF STUDENTS, IN THAT IT MAY SERVE AS A DISINCENTIVE TO PRIVATE SCHOOLS TO COMPLY WITH STANDARDS ESTABLISHED BY STATE EDUCATION AUTHORITIES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES

In many parts of the United States, as in the instant case, private school teachers are not required to meet State teacher certification requirements, *Carter*, at 161. Certification requirements vary among States, but typically require at least a bachelor's degree in the subject area taught, a supervised initial

teaching experience, and evidence of moral fitness. See *Manual on Certification and Preparation of Educational Personnel in the United States*, published by Kendall Hunt Publishing Company for the National Association of State Directors of Teacher Education and Certification (NASDTEC), 1991. In order to help ensure that persons who are incompetent or otherwise unfit for service in the schools for reasons such as pedophilia or other inappropriate or destructive behavior, State teacher certification offices have worked through NASDTEC to establish a teacher certification clearinghouse which allows information to be exchanged among the States, *Manual*, at O-1. Since compliance with standards is burdensome and certification requirements may eliminate potential teachers from a private school's pool of teacher applicants, elimination or modification of a requirement that all schools receiving funding for the education of children with disabilities meet State standards may lead private schools to withdraw from compliance, thereby subjecting students to greater risks of harm to their educational, mental, and moral well-being.

CONCLUSION

For the foregoing reasons, the National Association of State Boards of Education respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be granted in case no. 91-1523, *Florence County School district Four, et. al., v. Shannon Carter, By and Through Her Father and Next Friend, Emory Carter*, and the case be set for plenary review.

Respectfully submitted,

Douglas F. Bates
(Counsel of Record)
250 East 500 South
Salt Lake City, Utah 84111
(801) 538-7832
Counsel for the National Association of State Boards of Education, as Amicus Curiae.

Supreme Court, U.S.
FILED
APR 29 1992
OFFICE OF THE CLERK

(5)

No. 91-1523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR, *et al.*,
Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF OF THE STATES OF LOUISIANA, MARYLAND, NORTH CAROLINA, NORTH DAKOTA, OREGON, SOUTH DAKOTA, TENNESSEE, UTAH AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
JOANN GOEDERT
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

Attorneys for Amicus Curiae
State of Maryland

**Counsel of Record*

[Additional Counsel listed on inside cover]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

RICHARD IEYOUB
Attorney General of Louisiana
P.O. Box 94005
Baton Rouge, Louisiana 70804-9005

LACY H. THORNBURG
Attorney General of North Carolina
P.O. Box 629
Raleigh, North Carolina 27602

NICHOLAS J. SPAETH
Attorney General of North Dakota
600 East Boulevard Avenue
Bismark, North Dakota 58505

CHARLES S. CROOKHAM
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310

MARK BARNETT
Attorney General of South Dakota
State Capitol Building
500 East Capitol Avenue
Pierre, South Dakota 57501

CHARLES BURSON
Attorney General of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37243-0485

R. PAUL VAN DAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114

JOSEPH B. MEYER
Attorney General of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002

QUESTIONS PRESENTED

1. Whether a learning disabled child's parents are entitled to state reimbursement under the Individuals with Disabilities Education Act (IDEA), when they unilaterally place her in a private school that does not meet state educational standards or in other respects satisfy the criteria of a "free appropriate public education" which the state is required under 20 U.S.C. §§ 1401(a)(18) and 1412(1) to provide as a condition of receiving federal funding under the Act.

2. Whether a federal court may set aside an "Individualized Education Program" promulgated in accordance with the procedures called for in the IDEA, and affirmed on review by the state educational agencies, on the basis of achievement goals contained in the plan, notwithstanding substantial evidence that the child received educational benefits under the plan.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....1

INTEREST OF AMICI CURIAE AND INTRODUCTORY STATEMENT.....2

REASONS FOR GRANTING REVIEW.....6

I. A STATE EDUCATION AGENCY CANNOT MEET ITS OBLIGATION TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION TO STUDENTS WITH DISABILITIES IF IT CANNOT LIMIT PRIVATE EDUCATION PLACEMENTS TO PROGRAMS WHICH ARE APPROVED BY THE STATE AND OTHERWISE MEET THE STANDARDS OF THE IDEA.....6

II. THE DECISION BELOW EXPOSES THE STATES TO SIGNIFICANT MONETARY LIABILITY AND IMPAIRS THEIR ABILITY TO PROVIDE FREE APPROPRIATE PUBLIC EDUCATION AS REQUIRED BY THE IDEA.....15

CONCLUSION.....22

TABLE OF AUTHORITIES

Cases

Battle v. Commonwealth of Pennsylvania, 629 F.2d 269 (3d Cir. 1980), cert. denied, Scanlon v. Battle, 452 U.S. 968 (1981) 13

Board of Education v. Rowley, 458 U.S. 176 (1982).....passim

Johnson v. Independent School District, 921 F.2d 1022 (10th Cir. 1990), cert. denied, 111 S.Ct. 1685 (1991)..13

Statutes, Regulations and Rules

20 U.S.C. § 1400(c).....7,10
20 U.S.C. § 1401(a)(18).....i,7
20 U.S.C. § 1401(a)(18)(B).....10
20 U.S.C. § 1412(1).....i,2,10
20 U.S.C. § 1413(a)(2).....10
20 U.S.C. § 1413(a)(4)(B).....3,10
20 U.S.C. § 1413(a)(4)(B)(ii).....10
20 U.S.C. § 1415.....20
20 U.S.C. § 1415(e)(2).....11

Md. Educ. Code Ann. § 8-403(c).....9
Md. Educ. Code Ann. § 8-409(a).....8

34 C.F.R. § 300.153(a)(1)(ii).....14
34 C.F.R. § 300.153(b)(2).....15

Code of Maryland Regulations
§ 13A.05.01.11.....9
§ 13A.05.01.11(d).....9
§ 13A.09.09.....9

Sup.Ct.R.37.....1

No. 91-1523

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FLORENCE COUNTY SCHOOL DISTRICT FOUR, et al.,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF THE STATES OF LOUISIANA, MARYLAND, NORTH CAROLINA, NORTH DAKOTA, OREGON, SOUTH DAKOTA, TENNESSEE, UTAH AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Sup.Ct.R. 37, the signatory states respectfully submit this brief as amici curiae in support of Petitioners.

INTEREST OF AMICI CURIAE AND INTRODUCTORY STATEMENT

This case involves the states' ability to regulate the provision of publicly funded special education services in private schools. The Fourth Circuit's decision severely restricts that ability and impairs the states' capacity to meet their obligations under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., with serious adverse consequences for both the quality and cost of special education services.

Each state that receives federal funding under the IDEA is responsible for assuring "all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(1). This obligation extends to students educated in private as well as public schools, and in most states takes

the form of both significant regulatory responsibility and substantial financial obligation. See id., § 1413(a)(4)(B).

The issue in this case is whether state or local education agencies must reimburse parents who unilaterally place children with disabilities in private schools that do not meet the states' special education standards. The Fourth Circuit held that when a local school system has not provided an appropriate education to a student with disabilities, the student's parents may place that student in a private school and obtain reimbursement from the state, regardless of whether the private school meets fundamental educational requirements imposed by the IDEA. This Court should review that decision to address whether the IDEA requires public reimbursement to schools that fail to

satisfy the IDEA's most rudimentary standards.

Furthermore, in finding that the school district's placement in this case was inappropriate, the Fourth Circuit significantly altered the well-settled deferential standard for reviewing school system decisionmaking enunciated in Board of Education v. Rowley, 458 U.S. 176 (1982), by imposing on state and local education agencies an untenable and new standard that (1) requires public agencies to provide a more exacting "free appropriate public education" than is required by the IDEA or this Court's interpretation of that statute, (2) narrows the discretion of educational decisionmakers in developing special education programs, and (3) exposes public agencies to financial liability for costly unilateral private

school placements even when those placements fall far short of the IDEA's standards.

The IDEA imposes upon states the weighty obligation to ensure that all students with disabilities receive an appropriate education, and sets elaborate standards for appropriateness. The decision below makes it substantially more difficult for states, local school systems and private schools approved by the states to meet those standards, while removing many private institutions -- and students -- from the IDEA's reach. Review is warranted, therefore, to clarify the states' role in private school special education placements. Absent that review, state education agencies in the Fourth Circuit will be severely hampered in their efforts to serve students with dis-

abilities in accordance with the IDEA's strict mandates, and regulatory and reimbursement programs in other states will face even greater uncertainty given the widening conflict in the lower courts' treatment of this vitally important issue of public concern. See Pet. for Cert. at 17; App. at 15a.

REASONS FOR GRANTING REVIEW

I. A STATE EDUCATION AGENCY CANNOT MEET ITS OBLIGATION TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION TO STUDENTS WITH DISABILITIES IF IT CANNOT LIMIT PRIVATE EDUCATION PLACEMENTS TO PROGRAMS WHICH ARE APPROVED BY THE STATE AND OTHERWISE MEET THE STANDARDS OF THE IDEA.

In holding that private schools accepting unilateral placements need not meet "the whole panoply of duties" imposed by the IDEA (App. at 16a), the Fourth Circuit now allows such schools to ignore the IDEA's critical educational requirements and still obtain public reimbursement. Review is war-

ranted to determine whether Congress intended the IDEA to compel public agencies to pay for educational programs that fail to comply with the IDEA's most essential statutory duties.

Under federal law, state education agencies (SEAs) must scrutinize carefully non-public programs which serve students with disabilities and ensure that such programs meet the same standards as public school special education programs. The IDEA mandates that all children with disabilities "have available to them . . . a free appropriate public education." 20 U.S.C. § 1400(c). 20 U.S.C. § 1401(a)(18) defines "free appropriate public education" as special education and related services which:

> (A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,... [and]

(D) are provided in conformity with the individualized education program....

(Emphasis added).

Thus, the IDEA unambiguously mandates that the SEAs bear standard-setting and monitoring responsibility over all special education programs. Conversely, the IDEA does not exempt private, unilateral placements from the obligation to provide free appropriate public education, or the SEAs from ensuring that private schools meet that obligation. Many SEAs thus operate private school accreditation systems to regulate non-public school placements for conformance with the IDEA.[1]

[1] For example, Maryland law expressly provides that "a child who needs special education services that are not provided in a public county, regional, or State program shall be placed in an appropriate nonpublic educational program that offers these services." Md. Educ. Code Ann. § 8-409(a). That law directs the State Board of Education to develop regulatory (footnote cont'd)

In concluding that a private school which "does not attempt to comply with the terms of the [IDEA]" must nonetheless be paid with public funds for Shannon Carter's placement (App. at 11a), the court below swept aside the IDEA's central command that public agencies ensure all students a free appropriate public education, see, e.g.,

standards for accreditation of non-public programs, and mandates that the standards for non-public entities serving students with disabilities "may not be lower than the standards for the education of children who are enrolled in programs that are operated by a county board." Md. Educ. Code Ann. § 8-403(c).

Accordingly, the Maryland State Board of Education has promulgated regulations to govern the accreditation of non-public special educational programs so that they meet the IDEA's requirements. To gain such approval, the program must meet explicit standards which set forth the minimal criteria for special education services embodied in the IDEA and demanded of public school systems in this state. See Code of Maryland Regulations §§ 13A.09.09; 13A.05.01.11. In addition, the non-public institution must have written policies and procedures ensuring that Individualized Education Programs (IEPs) are developed for each student with disabilities. Id., § 13A.05.01.11(d). Similar regulatory programs exist in other states. See, e.g., North Carolina Procedures Governing Programs and Services for Children with Special Needs § 1527.

20 U.S.C. §§ 1400(c); 1412(1); 1413(a)(2), which the IDEA defines as an education provided by a program that "meets the standards of the State education agency. . . ." Id., § 1401(a)(18)(B). The Fourth Circuit's analysis passed over these fundamental principles by ignoring the statutory definition of free appropriate public education and focusing solely on the language of 20 U.S.C. § 1413(a)(4)(B), which directs the states to ensure that private schools to which public agencies refer students "meet standards that apply to State and local educational agencies . . . ." Id., § 1413(a)(4)(B)(ii). The court reasoned that because this provision applies only to private placements made by public agencies and not to unilateral placements by parents, the student's private school program

here was appropriate. (App. at 13a.)

Neither the IDEA, including the narrow provision cited by the Fourth Circuit, nor any of this Court's decisions support the Fourth Circuit's holding that private schools which unilaterally place students are entitled to state reimbursement merely by providing an education "reasonably calculated to enable the child to receive educational benefits." (App. at 17a, quoting Board of Education v. Rowley, 458 U.S. at 207.) To the contrary, this Court has stated that a reviewing court must make a more complete inquiry in determining whether reimbursement is appropriate under the IDEA:

> [A] court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed

> through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Board of Education v. Rowley, 458 U.S. at 206-07 (footnotes omitted).

The Fourth Circuit acknowledged that the private school in this case did not even attempt to comply with the IDEA's procedural requirements, noting, for example, that the school did not develop Individualized Education Plans (IEPs) for special education students, and employed teachers who not only fail to meet federal standards for special education personnel, but were not accredited to teach at all in South Carolina public public schools. (App. at 11a-12a.) State reimbursement is simply inappropriate in light of these profound deficiencies in the private school placement here.

Noting "the importance Congress

attached to [the IDEA's] procedural safeguards," this Court has observed that "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation . . . as it did upon the measurement of the resulting IEP against a substantive standard." Rowley, 458 U.S. at 205-06. IEPs serve as "the vehicle for giving content to the required 'free appropriate public education,'" Battle v. Commonwealth of Pennsylvania, 629 F.2d 269, 272-73 (3d Cir. 1980), cert. denied, Scanlon v. Battle, 452 U.S. 968 (1981), and represent the "cornerstone" of the IDEA. See Johnson v. Independent School District, 921 F.2d 1022, 1027 (10th Cir. 1990), cert. denied, 111 S.Ct. 1685 (1991). Unless an educational program is based upon an IEP, therefore, it is

not "appropriate" under the IDEA, and a state cannot use its special education resources to pay for it.

Similarly, the IDEA also does not sanction state reimbursement for services provided by uncertified teachers. The IDEA makes the states responsible for the staff qualifications in private schools. Federal regulations explicitly command that the states set suitable qualifications for personnel providing the IDEA's services to students "served by State, local and private agencies." 34 C.F.R. § 300.153 (a)(1)(ii) (emphasis added). These requirements, at the entry level, must be

> consistent with any State approved or recognized certification, licensing, or other comparable requirements that apply to the profession or discipline in which a person is providing special education or related services.

Id., § 300.153(b)(2). Because these requirements were not met in this case and no IEP was developed by the private school, state reimbursement is improper.

II. THE DECISION BELOW EXPOSES THE STATES TO SIGNIFICANT MONETARY LIABILITY AND IMPAIRS THEIR ABILITY TO PROVIDE FREE APPROPRIATE PUBLIC EDUCATION AS REQUIRED BY THE IDEA.

The Fourth Circuit's decision also modifies the well-established deferential standard governing the review of special education decisionmaking. See Board of Education v. Rowley, 458 U.S. at 206-07. The Fourth Circuit reached well beyond its authority in setting aside public special education determinations made below, as there are no allegations of procedural violations, and the record demonstrates that the student made significant educational progress when she was served according to Florence County's IEP. See Pet. for

Cert. at 24. The Fourth Circuit identified only one deficiency in Florence County's IEP: that one of the IEP's goals was too modest and prevented the student from achieving more than "minimal or trivial progress." (App. at 8a.) But in rejecting the student's IEP on this basis, the court ignored the record of Shannon Carter's actual experience under the IEP and, more significantly, disregarded this Court's admonition that "courts must be careful to avoid imposing their view of preferable educational methods upon the States." Rowley, 458 U.S. at 207.[3]

---

[3] It would seem, for example, an exercise in reasonable judgment for Florence County educators to conclude that making four months progress in a ten month academic year is appropriate for a seriously learning disabled student, or to heed the advice of the social worker hired by the student's parents that, for psychosocial reasons, Shannon Carter's academic program should not be too demanding. See Pet. for Cert. at 7. In rejecting wholesale the legitimacy of the valid considerations which may have motivated (footnote cont'd)

The court's decision in this case means that a school system which, at worst, may have merely underestimated a student's academic goals in the context of an effective IEP must now pay for placement in an expensive private school which did not even try to meet the IDEA's requirements for individualized education. That significantly broadens the circumstances under which a public agency's special education program may be found "inappropriate" on some narrow ground, while increasing the states' liability for placement at private programs that do not meet the IDEA's most basic standards.

That liability exposure is substantial, as private school placements constitute the most expensive

---

these educational decisions, the Fourth Circuit far exceeded the standard of review established by this Court.

element in the range of special education services. Maryland public agencies in 1991, for example, spent $27,502,354 to educate 564 students in private residential schools, resulting in an average residential placement cost of nearly $49,000 per year.[4] Additionally, when approving private schools, public agencies often are able to negotiate agreements with those schools as to reasonable tuition charges and other fees. Because no such cost controls would apply to unapproved schools that accept unilateral placements, public agencies risk open-ended liability to those institutions under the Fourth Circuit's decision. Therefore, even an otherwise appropriate placement to an unapproved school may

[4] In 1991, 1,355 Maryland students also attended private day programs, at a total cost of $27,528,820.

result in higher costs to the public agencies.

Fiscally strapped state agencies and local school systems now face these risks at the same time they confront the greatest demand ever for special education resources.[5] The Fourth Circuit nevertheless dismissed the seriousness of this problem with the observation that

> parents who unilaterally place their child in an unapproved private school bear substantial risks -- risks that function to ensure that our decision will not be a means through which parents can subvert the Act's emphasis on public education.

(App. at 18a.) Unfortunately, this assessment appears to be inaccurate. In Maryland, where approximately 30 state administrative hearings are held each

[5] In Maryland, for example, annual special education costs rose from $212 million in Fiscal Year 1981 to $571 million in Fiscal Year 1991.

year for all reasons pursuant to the IDEA's due process requirements, 20 U.S.C. § 1415, six cases have already arisen in the first three months of 1992 invoking the decision below to demand reimbursement for unilateral private school placements.

More fundamentally, the decision below threatens the states' ability to ensure that private placements, even at currently approved schools, will meet the IDEA's requirements. In eliminating any state capacity to ensure a free appropriate public education at schools which accept unilateral placements, the Fourth Circuit has substantially diluted the financial incentive which has motivated schools to comply with the IDEA's exacting standards and seek state approval. Because private schools can now obtain public reimbursement for some

special education placements regardless of their IDEA compliance, it is likely that fewer schools will opt to seek approval. Public agencies will thus find themselves with a smaller range of private school programs in which to place students who truly need intensive services, and will be less able to regulate private school providers as a whole for IDEA compliance.

That result directly contravenes Congress' manifest intent that the states vigorously assure that all students with disabilities receive a free appropriate public education, and that federal special education funds should be spent for that purpose alone. This Court should review this case and determine whether, as the Fourth Circuit decided, Congress intended increasingly scarce special

education resources to be used to pay for costly services that do not meet the IDEA's well-established standards.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
JOANN GOEDERT
Assistant Attorneys General
200 St. Paul Place
20th Floor
Baltimore, Maryland 21202
(410) 576-6318

Attorneys for Amicus Curiae
State of Maryland

*Counsel of Record

Richard Ieyoub
Attorney General of Louisiana
P.O. Box 94005
Baton Rouge, Louisiana 70804-9005

Lacy H. Thornburg
Attorney General of North Carolina
P.O. Box 629
Raleigh, North Carolina 27602

Nicholas J. Spaeth
Attorney General of North Dakota
600 East Boulevard Avenue
Bismark, North Dakota 58505

Charles S. Crookman
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310

Mark Barnett
Attorney General of South Dakota
State Capitol Building
500 East Capitol Avenue
Pierre, South Dakota 57501

Charles Burson
Attorney General of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37243-0485

R. Paul Van Dam
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114

Joseph B. Meyer
Attorney General of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002

Supreme Court, U.S.
FILED
APR 29 1993
OFFICE OF THE CLERK

No. 91-1523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

DONALD B. AYER
(Counsel of Record)
BETH HEIFETZ
DAVID A. YALOF
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Of Counsel
BRUCE E. DAVIS
1704 Fair Street
Camden, S.C. 29020
(803) 432-2880

Counsel for Petitioners

PETER W.D. WRIGHT
(Counsel of Record)
Court House Commons
4104 East Parham Road
Richmond, VA 23228
(804) 755-3000

NANCY McCORMICK
SOUTH CAROLINA PROTECTION & ADVOCACY SYSTEM FOR THE HANDICAPPED, INC.
Suite 208
3810 Landmark Drive
Columbia, S.C. 29204
(803) 782-0639

Counsel for Respondents

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Transcript Excerpts, U.S. District Court for the District of South Carolina	3
January 13-14, 1988 Proceedings	3
May 9, 1989 Proceedings	22
Order Granting Petition for a Writ of Certiorari (February 22, 1993)	26

RELEVANT DOCKET ENTRIES

I. United States District Court for the District of South Carolina

1.	7/30/86	- Complaint filed.
2.	8/22/86	- Motion of Defendants To Dismiss filed.
3.	3/13/87	- Motions Hearing.
4.	3/30/87	- Motion of Defendants for Summary Judgment filed.
5.	5/6/87	- Order granting Defendant's Motion for Summary Judgment on all of Plaintiff's claims entered.
6.	5/6/87	- Judgment entered for the Defendants and Complaint dismissed.
7.	5/29/87	- Notice of Appeal by Plaintiff of Judgment entered 5/6/87 filed.
8.	6/17/87	- Motion by Plaintiff for Relief from Judgment entered 5/6/87 filed.
9.	7/27/87	- Order that Plaintiff's request for relief pursuant to 60(b)(6) be denied as to the court's exclusivity ruling and granted on the limitations period ruling entered.
10.	1/13/88	- Non-jury Trial.
11.	1/14/88	- Non-jury Trial continued.
12.	5/9/89	- Non-jury Trial continued.
13.	1/30/91	- Findings of Fact and Conclusions of Law and Order entered.
14.	2/6/91	- Judgment entered.
15.	3/7/91	- Notice of Appeal by Defendant of Judgment entered 2/6/91 filed.

RELEVANT DOCKET ENTRIES (Cont.)

II. United States Court of Appeals for the Fourth Circuit

1.	3/20/91	- Civil case docketed.
2.	5/15/91	- Brief and joint appendix filed by Appellants.
3.	6/12/91	- Brief filed by Appellee.
4.	6/25/91	- Reply brief filed by Appellants.
5.	9/30/91	- Oral argument heard.
6.	11/26/91	- Published, authored opinion filed (91-1047).
7.	11/26/91	- Judgment order filed.

III. United States Supreme Court

1.	3/23/92	- Petition for a writ of certiorari filed.
2.	2/22/93	- Petition for a writ of certiorari granted, limited to Question 1.

TRANSCRIPT EXCERPTS
U.S. District Court for the District of South Carolina (Florence)

January 13-14, 1988 Proceedings

[TESTIMONY OF CECIL RAY HILL]

[2] * * *
BY MR. BURLINGTON:
Q Mr. Hill. Please state your full name for the record.
A Cecil Ray Hill.
* * *
Q Where did you work during the 1982, '83 school year?
A Florence District 4.
Q What was your position at that time?
A Guidance Counselor. Educational evaluator.
* * * [3] * * *
Q Did you ever have the occasion to evaluate or screen Shannon Carter?
A Yes.
Q About when was that?
A This would have been February of '83.
* * * [4] * * *
Q What kinds of testing did you do on Shannon Carter?
A I gave her an I.Q. test and an achievement test.
* * *
Q Do you have copies of this testing or your report?
A No. I don't.
Q Why is that?
A Well. When this first came up in '85, I guess, I looked for results. And I have looked for them probably half dozen times since. And I was very surprised that I couldn't find them. I don't know. They were probably mixed in with something. Whether they disappeared, I don't know.
[6] * * *

Q As a result of your screening in 1983, did you detect any learning disability extant in Shannon Carter?
A No. Not according to the guidelines we follow.
* * * [8] * * *
Q To what did you attribute her lack of academic success at that time?
[9]
A I had no knowledge of what she was doing in the class, you know. With a below average I.Q. and below average achievement. The achievement being similar to, you know, the deficit in I.Q. You would expect maybe slightly a slow learner, slightly on the slow side, you know.
* * * [10] * * *
Q You mentioned about certification by the state. Are you certified by the state as a school psychologist?
A I haven't received a certification. I just completed the internship.
Q And you were not certified back in 1983 as a school psychologist?
A That's right. I lacked two courses and an internship.
* * * [30] * * *

[TESTIMONY OF GLORIA NELSON]

Q Ms. Nelson, please state your full name for the record.
A Gloria V. Horne Nelson.
* * *
Q Where were you working during the 1984, 1985 school year?
A In Florence District 4.
* * * [31]
Q Did you hold that same position back in 1985?
A I was only the coordinator of programs for the handicapped at that time.
* * * [50] * * *
Q Now, was there much discussion the day of the I.E.P. about what would be the appropriate goals for Shannon in terms of the I.E.P. goals and objectives?
A Yes. There was discussion.
Q Do you remember, was there a reading goal?
[51]

A Yes. There was a reading goal.
Q Do you remember what it is?
* * *
A From a 5.4 grade level to approximately 5.8 grade level. I think.
Q Was there also a math goal?
A Yes. There was a math goal. Do I need to read that?
Q Briefly.
A Improve math skills from 6.4 to 6.8 grade equivalent. Measured by the Key Math Diagnostic test.
* * * [52]
Q If you could look at the first page. Does this I.E.P. have a starting date?
A It says that the date of implementation would be May 2, 1985.
Q Does it have an annual review date?
A By May 1, '86.
Q A one year time frame?
A Yes.
* * * [105] * * *
Q Did you ever discuss at this meeting a multi-district [106] agreement being a possibility as placement for Shannon?
A No, that would have been a more restrictive environment than they were discussing. When we weren't agreeing or discussing resource, why would we discuss that?
Q You stated that an L.D. self-contained placement was briefly mentioned. Yet you've also stated you didn't have an L.D. self-contained available. So it would seem logical you would discuss the possibilities inherent --
A We didn't have an L.D. self-contained placement in our district. That does not mean we didn't have that within our capabilities.
Q Was it communicated to the Carters that this was within your capabilities?
A If I discussed and described the continuum of programs, then, I was describing what possibly would be available or worked out. So I would think that they would assume that I would not be describing something that was beyond our capability.

Q But you don't remember describing a multi-district agreement per se with them?

A I didn't call the L.D. self-contained program a multi-district agreement, because we always have the option of creating a self-contained L.D. placement within our own district if we can find the certified teacher and the space.

Q Have you ever made a multi-district L.D. self-contained [107] placement?

A Not L.D. I have other categories of handicapped conditions.

Q You say it's possible that you could have an L.D. self-contained placement within the district. Why has that never been effectuated?

A We have not been able to, until this year, locate enough personnel that are certified in that area. And also with insufficient funds, insufficient numbers, then we can use our funds to better serve them by arranging multi-district agreements.

* * * [126] * * *

[TESTIMONY OF ELAINE CARTER]

Q Mrs. Carter, did you want Shannon to be put into an L.D. Resource Class?

A We were offered a Resource Class. It was my opinion at that time with Shannon's emotional problem that I did not want her placed in a class with mentally retarded students because of her low self-esteem and her depression. She already felt like she was dumb and stupid, and I felt that would further these feelings, and we had worked for two months trying to improve the way she felt about herself, and I thought this would just further --

Q It was your understanding that supplementally retarded children would be in this L.D. Resource Class?

A Yes, educationally mentally retarded, but I also understood that the students would know where Shannon was going, her friends, and basically she would be categorized by them, and I felt like Shannon could not take this pressure.

Q Did you understand that some emotionally disturbed children would be in this L.D. Resource Class?

A Yes.

Q In addition to the mentally retarded children?

[127]

A Yes.

Q Was that your objection to the L.D. Resource Class?

A Yes. I felt like that Shannon just did not need the pressure of facing her friends.

Q Now, did any district representative describe to you and Mr. Carter all the various available options as itinerant, resource, self-contained?

A We talked about resource, the itinerant and self-contained, but they said they didn't have any students in the high school that was in self-contained. And it was my understanding that they did not have a self-contained class at that time.

Q Was it your understanding that that was out of the question?

A Well, nobody ever said that we'll develop a self-contained class just for Shannon.

Q It was your understanding it was not available?

A Yes.

* * * [165] * * *

MARGARET MITCHELL, SWORN

DIRECT EXAMINATION

BY MR. BURLINGTON:

Q Ma'am, please state your full name for the record.

A My name is Margaret Mitchell.

* * *

Q Where are you employed?

A I'm employed at Trident Academy.

Q In what capacity are you employed there?

A I am Director of Language Development.

* * * [169] * * *

[THE COURT:] Before you get into that, what about Trident Academy. Is it a school designed for people with learning deficiencies?

THE WITNESS: Yes, it is. We do no evaluations.

* * * [170] * * *

Q Are all of the children that attend Trident learning disabled?

A Yes.

Q If they weren't, they wouldn't be there?

A Right.
Q Can learning disabilities be categorized as mild, moderate and severe?
A Yes.
[171]
Q Would the majority of students at Trident fit into one of these three categories?
A Yes, the majority are severe.
Q The majority are severe. How long do development classes at Trident last?
A Between 42 and 45 minutes.
Q How many periods a day do the kids, the L.D. students get there?
A Each student would have one 42 minute period a day.
Q Now, when this language development is going on, what is the pupil to teacher ratio at that point in time?
A It can be one student to one teacher or it could be two students to one teacher.
* * * [172] * * *
Q What types of classes are offered at Trident?
A Other than the language development program which is at the heart of the program, we have a regular program of [173] academic classes like any high school. We do not have a wealth of electives, but we have the basic history, math, algebra, grammar, literature, that a high school in this state would have, and they are awarded credits for those classes.
Q You have regular academic classes?
A Yes.
Q And you have language development classes?
A Yes.
Q Approximately what would be the student to teacher ratio in these academic, non-language development classes?
A The first year that Shannon came, they were between five and eight in the academic classes. It's now, I'd say, five to twelve in some classes.
* * * [175] * * *
Q Briefly describe Shannon Carter's specific disability, as you understand it?

A She had a severe inability to read. She was distractable, had difficulty concentrating. She had an enormous lack of understanding of words, which means that anything that she had lecture fashion would be very difficult for her to understand, and anything she read would make it very difficult for her to understand.
[176]
Q Was Shannon functionally illiterate when she came to you in the fall of 1985?
A Yes.
* * *
Q I'll ask you to look at Plaintiff's Exhibit 15. What is that, briefly?
A This is a testing summary for Shannon Carter. This means that this is the September score of 1985. And then the following scores in May, testing was done in May of 1986. A years testing.
Q Ms. Mitchell, I'm not going to ask you to read those. The Judge can certainly do that. Is it true that a very large amount of progression, remediation was made in that one school year?
A Yes.
* * * [179] * * *
Q In your opinion, what would an appropriate educational program for Shannon consist of as she first came to you at Trident?
[180]
A She needed a low student teacher ratio, she needed small classes, she needed intense remediation in terms of reading and written expression. She needed assistance in finding out, in developing some confidence and self-esteem.
Q And is that, in fact, consistent with what she has received at Trident?
A Yes.
* * * [181]
Q Ms. Mitchell, do you feel that the reading goal enunciated on that I.E.P., I believe that a 5.4 reading level to a 5.8 reading

level, do you feel that that reading goal was appropriate for Shannon Carter at that time?

A No.

Q Why is that?

A Shannon, according to her records, had demonstrated that she had an average intelligence, and I would think that a student with that kind of intelligence could have made more progression.

Q Do you consider that goal an underestimation of what legitimate progress should have been?

A Yes.

Q You've just stated that your understanding of the I.E.P. is three periods of itinerant L.D. per week. Do you consider that appropriate or was that appropriate in your opinion for Shannon Carter at that point in time?

A Not to me. She was basically illiterate, and this was not sufficient to make her literate.

* * * [182] * * *

[TESTIMONY OF JAMES G. WARD, JR.]

Q Dr. Ward, state your full name for the record.

A James Granberry Ward, Jr.

Q Where do you reside?

A In Mount Pleasant, South Carolina.

Q What is your occupation?

A I'm a practicing pediatrician in the Charleston area.

Q In your pediatric practice, have you treated children who suffer from learning disabilities?

A I certainly have.

* * * [183] * * *

Q Please tell the court about your academic credentials.

A I have a B.S. Degree in Biology and Chemistry from Wake Forest University. I have a Master's Degree in Psychology from Southern Illinois University at Edwardsville. I have a Master's Degree in Genetics from the University of New Hampshire, and I have a Master's Degree in Special Education with a concentration in Learning Disabilities from the Citadel. I have a Medical Degree from the Medical

University of South Carolina, and have residency training in pathology and pediatrics, also.

I'm a Clinical Assistant Professor at the Medical University of South Carolina, and I'm an Adjunct Professor in the Graduate School in the Department of Education, in Psychology, at the Citadel.

* * * [184] * * *

Q What is your professional relationship with Shannon Carter?

A I am her physician and became her physician when Shannon became a boarding student at Trident Academy.

Q Was that in the Fall of 1985?

[185]

A No. I actually saw Shannon in April of 1985.

Q Have you seen Shannon more or less continuously since she entered school in 1985?

A Yes. I see Shannon every one to two months while she attends Trident Academy. The reason for that is, in addition to Shannon's learning disability, Shannon has a significant attention deficit disorder for which she receives a medication and I monitor her very closely, so from September to graduation, to the end of the school term in May, I see Shannon almost every month, but never beyond two month intervals.

* * * [186] * * *

Q Has Shannon's attention deficit disorder made her learning disability more problematic?

A Yes, it certainly has.

* * * [188] * * *

Q Dr. Ward, have you had the opportunity to read and study the psychological evaluation done by Mr. Bailey on Shannon Carter?

A Yes, I have.

* * * [190] * * *

Q Does this document as a whole evidence a severe learning disability?

A Yes, it does, and he shows it with the test scores [191] very, very plainly.

* * * [192] * * *

Q Dr. Ward, do you feel that three periods of L.D. itinerant help per week as per the I.E.P. in question was appropriate for Shannon Carter at the time that I.E.P. was made?

A No, I do not.

* * * [193] * * *

Q Do you feel that the school district special educational offering to Shannon as evidenced in that I.E.P. in [194] question provided her with a free and appropriate special education?

A It was going to be free, but it was not appropriate.

Q Is your reasoning for that that it was not intensive enough?

A It was not intensive enough, and as you can see, with the total immersion that she had at Trident Academy, this child is really now reading at a 12th grade level. Any exit exam in the state, this child will pass now, just like all of the children are going to be required to take in our state now.

* * * [196] * * *

Q Dr. Ward, do you feel that Shannon Carter's placement at Trident has afforded her with an appropriate special education for her unique needs?

A I do.

* * * [205] * * *

Q You indicated that the L.D. itinerant placement was not intense enough. What about an L.D. resource placement?

A Not intense enough. I was amazed that she was not offered a self-contained L.D. class.

* * * [208] * * *

MR. BURLINGTON: Just one redirect question. Dr. Ward, you testified about L.D. self-contained placements. Is Trident Academy one type of legitimate L.D. self-contained placement?

A Trident Academy is certainly self-contained because their entire curriculum is set up to teach and remediate the learning disabled child.

* * * [214] * * *

[TESTIMONY OF MARGARET MITCHELL]

Q It's true, isn't it, Ms. Mitchell, that there are at least two members of the Trident Academy faculty who are not certified teachers. Is that correct?

A That's correct.

Q One of those uncertified teachers is, was Shannon's language development teacher. Is that correct?

A That's correct.

[215]

Q The other teacher who is not certified as a teacher by the State of South Carolina or any other state, was she also one of Shannon's teachers?

A No.

Q Just her language development teacher?

A Her language development teacher, the first year, was not certified. The one last year was certified.

* * * [233] * * *

DANIEL H. BALCOM, SWORN
DIRECT EXAMINATION

BY MR. BURLINGTON:

Q Now, Sir, please state your full name.

A Daniel Hugh Balcom.

Q What is your work position, Mr. Balcom?

A I'm headmaster at Trident Academy.

Q Is that the Chief Executive Officer of Trident Academy?

A Yes, it is.

Q How long have you served there?

A Nine years.

Q Now, Mr. Balcom, has Trident received accreditation or approval from any agencies or organizations that accredit schools?

A Yes, we have. We are accredited by the Southern Association of Colleges and Schools and the Palmetto Association of Independent Schools.

Q Is Trident a boarding school?

[234]

A Yes. Sir, it's both day and boarding.

* * *

Q Has Trident ever accepted a student from a public school district under Public Law 94142?
A Yes, we have. In my nine years there, we've had approximately seven.
Q Was the tuition ever paid by the school district itself?
A Yes.
Q Any in South Carolina?
A Yes. About three in South Carolina, and four from North Carolina.
Q Would Trident now or in the future accept a student [235] from a public school district under 94142?
A Yes, we would.
Q In the past, have these tuition monies come directly to Trident from the school district?
A Yes. It is.

MR. BURLINGTON: That's all the questions I have.

THE COURT: Cross Examination.

CROSS EXAMINATION

BY MR. DAVIS:

Q Mr. Balcom. It's true that Trident Academy has never been state approved or state authorized for Shannon's placement at Trident Academy. Has it?
A There's never been a request. But we've always been approved by the State Department of South Carolina in the case of students applying to come under 94142.
Q Always been approved?
A Yes.
Q Do you have any reason to think if application was made for approval in Shannon's case, that approval would be granted?
A I have every reason to think it would be.
Q Do you have any reason to think it would be denied?
A No. I can't think of any offhand, although in every other situation, the approval was made prior to the student you know, coming.

* * * [239]

ROBERT BLACK, SWORN

DIRECT EXAMINATION

BY MR. DAVIS:

Q Could you state your name.
A Robert S. Black.
Q Dr. Black, how are you employed?
A I am employed by the State Department of Education for South Carolina, Director of Office of Programs for the Handicapped within the Department of Education.
Q How long have you been so employed?
A In South Carolina in the present position, 14 and a half years.

* * * [240] * * *

Q Could you describe for us the goal which the state agency of which you're the head plays in the implementation of the Education Of All Handicapped Children's Act in this state?
A It is required of the State Department of Education to develop regulations to implement federal regulations, which are spawned by federal law, and to develop procedures for the conduct of the regulations. To ensure that those regulations are carried out. To monitor. To determine compliance, degrees of compliance of the law and regulations and funding.

[241]

Q Is your office regularly engaged in monitoring various Special Education Programs that are operative in the public schools around this state?
A All programs of Special Education in the State are monitored at least every three years on a site visit. Monitoring occurs again continuously through application, investigation of complaints and a variety of other instruments. The on-site formal monitoring document is once every three years.

* * * [242] * * *

Q Is there any state law or state regulation promulgated and enforced by your Department with reference to a need on the part of private schools to be authorized or approved as a private school placement for 94142 funded students?
A Yes, sir.
Q What are those rules, what is the law and regulations with respect to that?
A Federal law, if I may paraphrase, and federal regulations required that the safeguards and all the rules and regulations applicable to a public school must be in place [243] with a

private school if that student is the recipient of public funds under 94142 for payment of that program. That would include, then, fundamentally, certified teachers, length of school day, that sort of thing.

Q Does the certification credentials or qualifications of the teachers employed by the private schools have any bearing on their eligibility for such approval?

A Yes, sir.

Q What bearing does it have?

A They must have the same certificate as public school teachers issued by the Department of Education.

Q Are you familiar with the existence of any specific state statute to that effect?

A There is a statute, a state statute that provides that anyone employed by the state in the public domain. I use public domain using school district, that they must be certificated, as a condition of employment, under certification as issued by the Department of Education.

* * * [244] * * *

Q Whenever a school makes an application or a bid for approval, does your office investigate the application in any way?

A Our office reviews the application to ensure that the requirements of regulations and law are met. There is a litany of requirements for that, yes, sir.

Q What possibility, if any, is there that the State Department would approve an application for approval on the part of a district which hired or employed uncertified teachers?

A We would -- we cannot approve an application if the teacher is not certified by the Department of Education.

* * * [253] * * *

[TESTIMONY OF ALFRED A. GRANT]

Q Dr. Grant, state your full name.

A Alfred Allison Grant.

Q What is your occupation, Dr. Grant?

A I'm in the practice of psychiatry, general psychiatry, adult and child psychiatry.

Q Where do you practice?

A I practice in Macon, Georgia.

Q Very briefly go over your academic background in terms of degrees.

A I received my Bachelor's Degree from Emory University, received my M.D. Degree from Medical College of Alabama, received my psychiatric training from Duke University Medical Training Center and completed a child and adolescent [254] fellowship at Duke University Medical Center.

Q Over your years of practice, have you examined numerous children with learning disabilities?

A Numerous.

Q Have you ever consulted with local school districts regarding Special Education?

A Yes.

Q Were some of these consultations regarding children with learning disabilities?

A Yes.

Q Are you associated with a psychiatric hospital?

A I am.

Q What component of that hospital?

A A children's in-patient unit and an adolescent in-patient unit.

Q Is your work there extensive?

A Yes, and both of these programs have, have there own educational system.

Q Do many of the children you see in this adolescent unit have learning disabilities?

A In the adolescent unit, I would say approximately one-half to two-thirds have learning disability elements to their dysfunction.

* * * [255] * * *

Q How many times grand total have you evaluated Shannon?

A I've evaluated Shannon in July of '85 and June of 1986.

Q And this evaluation dated July 15, 1985, you made a diagnosis?

A I did.

Q Very briefly, tell us the diagnosis in one or two words?

A One diagnosis was major depression, another diagnosis was attention deficit disorder with hyperactivity, and then language disability.

* * * [256] * * *

A Shannon's depression dated at least a year and a half to possibly two years before I saw her in July of 1985. This relatively coincides with her entering the public school system. I could find no factors other than Shannon's ongoing difficulty with academics and the reaction of the school personnel to that, and the reaction of her parents to what they were told by the school Shannon should be doing.

Q Did you find Shannon's self-esteem and self-concept to be low?

A Very low.

Q Had Shannon expressed any suicidal ideations?

A She had given thoughts to hurting herself. I think. If I recall specifically, she had contemplated cutting her wrists.

Q All right. As a result of your evaluation, did you find Shannon's learning disabilities to be due to a lack of effort or lack of motivation?

A Absolutely not.

Q Were these learning problems due to any passive resistance or manipulative behaviors?

A Absolutely not.

Q Did you notice any feelings upon examining Shannon that she felt she was stupid or dumb?

[257]

A She used the words both dumb and stupid.

Q Did you detect a sense of failure?

A Profound failure and profound inadequacies.

* * * [258] * * *

Q In your opinion, does the evaluation show a significant learning disability?

A Profound.

* * *

Q In your opinion, is the reading goal advancement of four months advancement in a full year consistant with her intellectual potential?

A Not only is it not consistent with her potential but it is extremely detrimental to her psychologically.

* * * [259] * * *

Q Given the seriousness of Shannon's deficits as shown by the school district April evaluation, is it your opinion that three periods of learning disability itinerant classes a week would have been inappropriate for her?

[260]

A That would have been grossly inadequate.

Q Are you aware of the type of Special Education Program offered at Trident Academy at Mount Pleasant?

A My understanding is that Trident offers a small teacher to student ratio, that it involves intensive remediation in the areas that need remediated, and that they also provide a one-on-one daily program to assist in special areas. I believe with Shannon it's in terms of language development.

* * *

Q All right. Would you consider placement at Trident to have been an appropriate special education for Shannon at the time you first evaluated her in 1985?

A Yes.

Q In Plaintiff's Exhibit 24, the re-evaluation, as you put it, did you consider an additional year at Trident appropriate for Shannon at the time of your re-evaluation in June of 1986?

A A minimal one year addition.

Q Now, sir, in your opinion, was Trident the maximal or [261] optimal special educational offering for Shannon?

A The maximal or optimal? I think when you are considering the type of educational placement that can serve a youngster with a learning disability to the degree that Shannon has, I think on the minimal. I would say full day L.D. classroom placement would be the bare minimum. I would think. Now the maximums go up to special residential schools that go around the year, 12 months. Part of the reason they do that is so that the student does not lose learned information over a summer break. And learning disability students, one of the aspects of their dysfunction is they will learn information but

can easily lose that information. They have to repetitively relearn.

So, I think you're talking about a minimum of a full day L.D. class in the local community along to a residential extensive type placement. So in considering Trident, I would consider it appropriate, but it certainly is not maximum and not optimal.

Q It's not the end of the line?

A No, not when you look around the United States and what's available.

Q But in your opinion, it provided an appropriate setting for her?

A An appropriate setting.

* * * [266] * * *

[TESTIMONY OF SHIRLEY A. RITTER]

Q Please state your name for the record, doctor?

A Shirley A. Ritter.

Q All right. Where do you reside?

A In Greenville, South Carolina.

Q What is your occupation?

A I'm Assistant Professor at Furman University.

Q You teach at Furman. Have you taught Special Education courses at Furman?

A Yes, should I elaborate?

Q If you wish.

A Introduction to Special Education, Characteristics of Learning Disability, Procedures for Teaching, Learning Disabled Behavior, Advanced Procedures of the same. Simplifying Student's Practices, Student Teaching, the majority of these in undergraduate and graduate level.

Q Would these practicums involving these teachers, would some of them be in L.D. classrooms?

A Very much so, and student teaching also in students identified as having learning disabilities.

* * * [274] * * *

Q Doctor, given your knowledge of the education that Trident provides as per your observation, and given the deficit shown in Shannon's April, 1985 evaluation and the special education

program instituted for her via the May 1, 1985 I.E.P., in your opinion, was the educational placement of L.D. itinerant for three periods per week offered by the school district appropriate?

A To me it was not appropriate. It was inadequate.

Q Was the private school chosen by the parents, Trident, an appropriate special education placement under 94142?

A What I see Shannon, on paper at this time, needing for appropriate would be a program, self-contained program that would provide a multi-sensory approach that would provide some basic reading, developmentally reading improvement, which Trident, which is incorporated in Trident, under the language development, what they call language development classes: a [275] supportive environment, which would be the teacher of that self-contained class. Other teachers who might be involved with Shannon in anything in which she might be mainstreamed in content or non-academic areas. And a low teacher student ratio. So for those reasons, I see Trident as an appropriate placement.

Q Doctor, would a conventional in-district L.D. self-contained placement be hard pressed to educate a child with the kind of deficit that Shannon has?

A Yes.

* * * [364]

[TESTIMONY OF JOHN C. RICHARDSON]

Q Would you state your name, please, sir.

A John C. Richardson.

Q Where are you employed?

A Clemson University.

Q What is your position at Clemson University?

A I'm an Associate Professor in the College of Education.

* * * [388] * * *

Q Did you hear testimony that the great majority of the teachers at Trident, as a matter of act, all but two are certificated in Special Education?

A Yes, sir.

Q Now, in a local school district L.D. resource placement, would the great majority of all the other academic area teachers be certificated in Special Education?

A No.

* * *

May 9, 1989 Proceedings

---

* * * [6] * * *

[MR. DAVIS:] Dr. Nagle would be called as the Court's witness and you would elicit from him the testimony that you are looking for, answers to questions you have to ask, and then we would be given the opportunity to ask questions following [7] the Court's examination of Dr. Nagle.

* * * [27] * * *

[TESTIMONY OF RICHARD J. NAGLE]

Q Dr. Nagle, do you feel you know enough about Trident to venture an opinion as to whether they provided an appropriate Special Education for Shannon?

A I would say given the change in test scores, I would say that they did a very effective job.

* * * [49] * * *

Q One question bearing on your assertion that Shannon should have been -- don't let me put words in your mouth, but very probably should have been identified earlier.

Is it your understanding of the Education For All Handicapped Children's Act, that school districts have an affirmative duty to try and find and identify students that would qualify for special education?

A That is correct.

Q It's not entirely on the parents to present the child to the school district; is that true?

A That's correct.

Yes.

Q The school district is supposed to look for handicapped kids?

A That's correct.

* * * [56] * * *

[TESTIMONY OF SHIRLEY A. RITTER]

Q Now, Dr. Ritter, since we last convened, you have examined both Mr. Bailey's evaluation of April '85, and Dr. Nagle's 1988 evaluation?

A I have.

[57]

Q Okay.

Generally speaking, taken in the aggregate, does Dr. Nagle's evaluation show a mild, moderate or large amount of achievement gain on the part of Shannon?

A Overall, they show considerable or large gains for Shannon.

Q I believe you heard there's no need to enumerate the individual scores over again, but on the Wide Range Achievement Test, the WRAT, you heard -- and I see from your notes that the scores went in reading from 6.9 to 9-B; 4.6 to 9-B, and 6.9 to 11-B in spelling.

Now, in reading, the 6.8 level to the 9-B level, how significant do you see, in your opinion, that amount of forward progress?

A Again, I see that as substantial, in terms that she had been performing below grade level, and she was making similar progress, as would a normal non-handicapped individual would be making; or in light of the standard scores, would be similar, in that she was making the similar levels of gains, and was not getting any further back.

Whereas when she was tested in April of '85, she was in ninth grade, and she was performing below grade level, or with a lower standard score.

Three years later, she was holding that one-year growth or one-year gain per year of instruction, which is [58] anticipated of not handicapped students of the average student.

Similarly, in standard scores, she was making a similar gain or holding her own with a tendency towards a gain, but holding her own and not getting any further behind.

* * * [60] * * *

Q Dr. Ritter, we were talking about the school district May First, 1985, IEP.

What's your recollection of the reading and math advancement goals?

A Excuse me, that it was four months for reading and for math, for the -- for one academic year.

Q Okay.

[63]

Q In your opinion, was this four-month goal enough to remediate her and bring her back up to level?

A No.
The goal was much lower than what it should have been for her, and would not have brought her to performing at an increased rate.

* * * [64]

Q Going back to Dr. Nagle's test results, are they one valid indicator that the schooling Shannon did receive at Trident Academy enabled her to adequately progress from grade to grade?

A To me, they certainly are one valid and reliable indicator.

Q Okay.
Now, would you say that her progress at Trident, the three years she was there, would you say her progress there was incremental or minimal?

A It certainly was incremental at Trident.

Q Was it small or minimal?

A No.

Q It was substantial.

A Okay.

Q She was making one year goal per year of instruction, roughly.
And in some areas, greater than that.
And, again, using the grading equivalency, when looking at the standard scores, she was holding her own, she was being compared to more sophisticated students, and still able to hold her place or -- in terms of the standard scores are increased slightly, not significant level, but a tendency an increase.
So yes, the gains were substantial.

* * * [123] * * *

EMORY CARTER, was called as a witness, after having been first duly sworn, on his oath, testified as follows:

* * * [131] * * *

Q Did the school district do anything to lead you to believe that they would educate Shannon outside of the Timmonsville School District No. 4?

A No, sir.
We had no knowledge of this was even available, and it was never offered.

Q Never presented to you?

A Never presented. We had no knowledge of anyone being able to go to another school district.

* * *

**IN THE SUPREME COURT
OF THE UNITED STATES**

[Caption Omitted in Printing]

Order Granting Petition for a Writ of Certiorari, limited to Question 1, entered February 22, 1993.

Supreme Court, U.S.
FILED
APR 29 1993
OFFICE OF THE CLERK

No. 91-1523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONERS

Of Counsel

BRUCE E. DAVIS
1704 Fair Street
Camden, S.C. 29020
(803) 432-2880

DONALD B. AYER
(Counsel of Record)
BETH HEIFETZ
DAVID A. YALOF
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioners

37 pp

QUESTION PRESENTED

Whether a learning disabled child's parents are entitled to state reimbursement under the Individuals with Disabilities Education Act (IDEA), when they unilaterally place her in a private school that does not meet state educational standards or in other respects satisfy the criteria of a "free appropriate public education," which the state is required under 20 U.S.C. §§ 1401(a)(18) and 1412(1) to provide as a condition of receiving federal funding under the Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT 2

SUMMARY OF ARGUMENT 10

ARGUMENT 12

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT PROVIDES NO LEGAL BASIS FOR COURT-ORDERED PUBLIC FUNDING OF A UNILATERALLY SELECTED PRIVATE SCHOOL PLACEMENT THAT FAILS TO MEET STATE EDUCATIONAL STANDARDS OR UTILIZE THE IEP PROCEDURE 12

II. COURT-ORDERED PUBLIC REIMBURSEMENT OF PARENTS FOR A UNILATERAL PRIVATE SCHOOL PLACEMENT THAT FAILS TO MEET STATE STANDARDS OR PROVIDE AN IEP IS CONTRARY TO THE PURPOSES OF THE IDEA 22

A. The Decision Below Undermines The Role Of The States As The Primary Educational Authority In Formulating Policy In Cooperation With Parents . . 22

TABLE OF CONTENTS (Cont'd)

Page

B. The Decision Below Threatens The Financial Health Of The Public School System 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

Cases

Board of Educ. v. Rowley, 458 U.S. 176 (1982) . . . . . *passim*
Burlington Sch. Comm. v. Massachusetts Dep't of Educ., 471 U.S. 359 (1985) . . . . . *passim*
Colautti v. Franklin, 439 U.S. 379 (1979) 17
Connecticut Nat'l Bank v. Germain, 112 S.Ct. 1146 (1992) 15
Dixson v. United States, 465 U.S. 482 (1984) 24
Doe v. Brookline Sch. Comm., 722 F.2d 910 (1st Cir. 1983) 18
Federal Power Comm'n v. Panhandle Eastern Pipe Line, 337 U.S. 498 (1949) 15
Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) 11
Honig v. Doe, 484 U.S. 305 (1988) 11
Lunceford v. District of Columbia Bd. of Educ., 745 F.2d 1577 (D.C. Cir. 1984) 27
Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1 (1981) 14
Rubin v. United States, 449 U.S. 424 (1981) 15
San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 23
Shapiro v. United States, 335 U.S. 1 (1948) 15
Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563 (2d Cir. 1989) 10

Statutes

Individuals with Disabilities Education Act, 20 U.S.C.A.
§ 1400 *et. seq.* (West 1990 & Supp. 1993) 2, 10
20 U.S.C. § 1400(c) 12, 17, 23
20 U.S.C. § 1401(a) . . . . . *passim*
20 U.S.C. § 1412(1) 2, 11, 12, 20
20 U.S.C. § 1412(2) 4, 21
20 U.S.C. § 1412(3) 21

TABLE OF AUTHORITIES (Cont'd)

Page

20 U.S.C. § 1412(5) 6, 13
20 U.S.C. § 1412(7) 12
20 U.S.C. § 1413 4
20 U.S.C. § 1413(a) . . . . . *passim*
20 U.S.C. § 1413(c) 4
20 U.S.C. § 1414(a) 4, 12, 14, 21
20 U.S.C. § 1414(e) 21
20 U.S.C. § 1415(a) 12
20 U.S.C. § 1415(b) 4, 12, 22
20 U.S.C. § 1415(c) 4
20 U.S.C. § 1415(e) 4, 13, 19, 20, 21
28 U.S.C. § 1254(1) 2
Pub. L. No. 94-142, 89 Stat. 773 (1975) 19
Pub. L. No. 101-476, 104 Stat. 1103 (1990) 19

Rules and Regulations

Office of Special Education and Rehabilitation Services Rules, 34 C.F.R. §§ 300.1-300.754 (1992) 2
34 C.F.R. § 300.345 22
34 C.F.R. § 300.347(c) 13
S.C. Code Regs. 43-62(K) 14
S.C. Code Regs. 43-243 . . . . . 3, 7, 14
S.C. Dep't of Educ., *Defined Minimum Program for South Carolina School Districts* (1986) 3, 14

Legislative History

S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425 . . . . . 23, 27

TABLE OF AUTHORITIES (Cont'd)

Page

Other Authorities

Council of State Governments, *The Book of the States 1992-93* (1992) 28
Martha A. Fabricius, *More Dictates From the Feds*, State Legislatures, Feb. 1991, at 28 28
Jerry Parkinson, *Parents' Unilateral Placement of a Disabled Child in an Unapproved Private School: A "Free Appropriate Public Education"?*, 76 Educ. L. Rep. 893 (1992) 19
Chris Pipho, *Fiscal Gridlock*, Educational Finance, Feb. 1993, at 430 28
2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978) 17
S.C. Dep't of Educ., *Ranking of the Counties and School Districts of South Carolina 1990-91* (1992) 26
Sutherland, *Stat. Const.* § 27.02 (4th ed. 1985 Revision) 18
Jay Taylor, *Desperate for Dollars*, The American School Board Journal, Sept. 1992, at 21 28
U.S. Dep't of Education, *Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (1992) 27
U.S. Dep't of Education, *Individuals with Disabilities Education Act: Program-Funded Activities, Fiscal Year 1992* (1992) 27
U.S. Dep't of Education, *Justifications of Appropriation Estimates to the Congress, Fiscal Year 1994* (1993) 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1523

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-19a) is reported at 950 F.2d 156 (4th Cir. 1991). The order and decision of the United States District Court for the District of South Carolina (Pet. App. 20a-39a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1991. On February 11, 1992, this Court granted Petitioners' request for an extension of time in which to file their Petition for a Writ of Certiorari until March 24, 1992. The Petition was timely filed on March 23, 1992, and certiorari was granted, restricted to the first question presented in the Petition, on February 22, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant sections of the Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 *et seq.* (West 1990 & Supp. 1993), its accompanying regulations, 34 C.F.R. §§ 300.1-300.754 (1992), and certain provisions of South Carolina law, are set forth in the Appendix to the Petition for Writ of Certiorari. Pet. App. 56a-72a.

STATEMENT

At issue here is whether the Individuals with Disabilities Education Act justifies court-ordered reimbursement of parents who, dissatisfied with what is later found to be a legally deficient public school placement, unilaterally enroll their child in a private school setting that fails to meet the Act's explicit requirement of a free appropriate public education.

1. *The Statutory Scheme*: The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA" or "Act"), formerly titled the Education of the Handicapped Act, imposes a number of conditions on states in return for federal funds to aid in educating children with disabilities. The essential condition is that states provide a "free appropriate public education" ("FAPE"). 20 U.S.C. § 1412(1). Pursuant to the Act, a FAPE consists of schooling that is provided at public expense, under

public supervision and direction, in conformity with an "individualized education program" ("IEP"), and, significantly, one that meets the standards of the state educational agency. *See* 20 U.S.C. § 1401(a)(18).

This express incorporation of state laws and regulations governing the provision of education in general, and education to children with disabilities in particular, provides substantive content to the essentially procedural cast of the Act's other requirements. In South Carolina, private schools in which handicapped children have been duly placed as well as all public schools must conform to the Defined Minimum Program for South Carolina School Districts (1986) ("DMP"). S.C. Code Regs. 43-243(E)(7), Pet. App. 69a-71a.

The DMP is designed to ensure "adequate education opportunities to every student." DMP at 1. This is achieved through South Carolina's definition of the "minimum acceptable education program," and through the requirement of "adequate human and financial resources to insure at least the minimum program [will] be obtained." *Id.* The DMP specifies the requirements teachers must meet in order to be certified and thus permitted to teach in South Carolina public schools. The DMP imposes substantial other requirements, including, *inter alia*, length of school year, pupil/teacher ratio, curricular offerings, and health and safety protective measures that schools must meet in South Carolina.

The centerpoint of the Act's procedural requirements is the IEP, which "results in individualized consideration of and instruction for each child." *Board of Educ. v. Rowley*, 458 U.S. 176, 189 (1982). Consistent with the Act's intention to foster cooperation between school officials and parents, this personally-tailored educational program must be prepared at a meeting between a qualified representative of the local education agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child. 20 U.S.C. § 1401(a)(20).

By definition, the IEP consists of a statement of (1) the child's "present levels of educational performance"; (2) "annual goals, including short-term instructional objectives"; (3) "specific educational services to be provided"; (4) a "date for initiation and anticipated duration" of services; (5) "needed transition services for students"; and (6) "criteria and evaluation procedures" for determining whether the objectives are being met. 20 U.S.C. § 1401(a)(20). Under the Act, the IEP must be reexamined and reevaluated prior to the start of each school year, and can be revised periodically where appropriate. 20 U.S.C. § 1414(a)(5). Should disagreements ensue, the Act provides for review of the IEP in the first instance by the local education agency, with a hearing before an impartial arbiter. 20 U.S.C. § 1415(b)(2). Thereafter, review is available before the state education agency, 20 U.S.C. § 1415(c), and then in federal district court, 20 U.S.C. § 1415(e)(2).

In addition, states seeking to receive federal funding under the Act must submit a State Plan to the Secretary of Education. 20 U.S.C. § 1413. The Plan must include several assurances concerning, *inter alia*, proper expenditure of federal funds, personnel development and certification, and steps to be taken to assure a FAPE to all children with disabilities. 20 U.S.C. §§ 1412(2), 1413. Prior to release of federal funds, the Secretary of Education must approve a state's Plan. *Id.* at § 1413(c). South Carolina operates under an approved Plan.

2. *Facts*: Shannon Carter began her elementary education at the local public school in Florence County, South Carolina, School District Four in the fall of 1975. In order that Shannon could attend school "with the children that she was with in our community, at church" (C.A.J.A. 48),[1] Shannon's parents

[1] "C.A.J.A." refers to the joint appendix filed with the court of appeals. Facts have been included here as background material whose primary relevance is to Question 2 of our Petition for Certiorari, on which the Court denied certiorari. Rather than include supporting information on these matters in the joint appendix ("J.A.") filed pursuant to this Court's Rule 26, reference is made to the joint appendix in the Court of Appeals, copies of which were lodged with the Clerk of this Court at the time the Petition for Certiorari was filed.

withdrew her from the public school and enrolled her in a private academy in a neighboring county following first grade. Pet. App. 23a. Shannon completed her elementary education at the private school. *Id.* In the fall of 1982, her parents re-enrolled her in the Florence County public school to begin the seventh grade. *Id.* at 24a.

Shortly after Shannon's return to the public school, Mrs. Carter requested that tests be performed of Shannon's I.Q. and achievement levels.[2] The high school guidance counselor performed these tests, as did the school district's educational evaluator. Both sets of test scores indicated that Shannon was slightly below average in achievement, but reflected no learning disability. Pet. App. 24a.

In March 1985, upon discovering that Shannon had altered her report card to reflect better grades than she was actually receiving, Shannon's mother informed school administrators that she was considering placing Shannon in a private school despite the fact that the school year was nearing completion. C.A.J.A. 100-01. The school district determined that it would conduct an evaluation of Shannon. Those tests, conducted in the spring of 1985, suggested that Shannon had a serious learning disability. Pet. App. 25a.

During this time period, prior to the formulation of an IEP, Shannon's parents continued to suggest that they preferred not to have their daughter attending the public school, and that they were skeptical of the District's ability to provide special education

[2] Learning disabilities are acknowledged and quantified based on the difference between ability, as measured by a standard I.Q. test, and achievement (or performance). Pet. App. 25a.

services. C.A.J.A. 105, 109. Nonetheless, school officials continued their efforts under the IDEA to develop, with parental input, the proper educational program for Shannon. Accordingly, during the latter part of April 1985, District officials provided Mrs. Carter with the results of Shannon's evaluation and described to her a range of educational programs that the school would provide (at no cost to the Carters) that would be helpful to Shannon. In addition, in keeping with the IDEA, school officials outlined the statutory process for determining the proper educational program for Shannon, and the procedural rights under the IDEA attendant to that process. C.A.J.A. 106, 109, 143. The officials also provided Mrs. Carter with written descriptions of the process and of her rights under the IDEA. C.A.J.A. 143.

On May 1, 1985, the District officials and the Carters met to formulate the specifics of an IEP for Shannon. The school district proposed that Shannon remain in regular classes to a substantial degree, consistent with the IDEA's "mainstreaming" requirement, 20 U.S.C. § 1412(5)(B),[3] and spend at least one period each school day in the school's specialized "resource room" where she would receive intensive, personalized tutoring along with two to four other students. C.A.J.A. 121, 123. Shannon's parents strongly objected to the proposed "resource room" placement. Instead, they insisted upon an "itinerant program," under which Shannon would receive private tutoring from a particular teacher of their choosing, notwithstanding that it would involve fewer

[3] The Act requires participating states to establish "procedures to assure that, to the maximum extent appropriate, children with disabilities. . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . ." 20 U.S.C. § 1412(5)(B).

hours of special instruction per week than would occur under the "resource room" placement.[4] Pet. App. 26a n.7.

In addition, the social worker hired by Shannon's parents requested that the District establish easy-to-achieve goals for Shannon. This would, according to the social worker, benefit Shannon by minimizing her risk of failure and increasing her self-esteem. C.A.J.A. 278, 282-86. After some discussion, the IEP was signed by both Shannon's parents and representatives of the District, incorporating both the itinerant proposal and the modest goals proposed by the Carters' social worker. These goals, which were to be viewed as the minimum gains to be achieved, consisted of four months' progress in reading and four months' progress in math. Pet. App. 27a.

The IEP took effect toward the last quarter of Shannon's ninth grade year. Shannon's grades improved substantially in the grading period immediately following implementation of the IEP; indeed, from two D's and three F's in the first semester of that year, Shannon went to one B and four C's in the second semester. C.A.J.A. 52-53. These grades were more than sufficient at the end of the spring term to allow her to pass the ninth grade. C.A.J.A. 149, 263, 269, 271, 292-93.

Despite this significant improvement in Shannon's grades, her successful completion of the ninth grade, and the fact that "[p]arents and school personnel may request another IEP meeting at any time they feel that a change is needed in the student's IEP" (C.A.J.A. 366), Shannon's parents sought a formal administrative hearing during the summer of 1985. This hearing was essentially a challenge to the IEP they had been instrumental in shaping.

[4] Pursuant to 20 U.S.C. § 1412, the South Carolina State Board of Education adopted Regulation 43-243, which defines these programs. Under the itinerant approach, Shannon received individualized attention from a special education teacher just three periods per week. C.A.J.A. 122.

Pet. App. 5a. At the same time, but without informing school officials, Shannon's parents submitted an application on Shannon's behalf to Trident Academy, a private school for learning disabled children located over one hundred miles from their home. C.A.J.A. 169-70. On August 8, 1985, Shannon was accepted for admission to Trident. She began the tenth grade there that fall, and remained a student there until her graduation in 1988. During Shannon's time at Trident, it did not utilize the IEP procedure. In addition, it employed a number of teachers who were not certified in accordance with South Carolina State law. Pet. App. 11a-12a.

At the administrative hearing conducted on August 20, 1985, the local education agency hearing officer determined that the education program for Shannon set forth in the IEP was appropriate. Pet. App. 44a-54a. In addition, the hearing officer pointed out that other programs were available in the school district, should later test data or performance indicate a need for a change in placement. Pet. App. 54a. Shannon's parents appealed that decision to the state education agency which, on October 14, 1985, affirmed. Agreeing that the IEP provided an "appropriate education," the agency then turned to the propriety of placing Shannon in a school that did not permit her to live with her parents. "[T]he concept of least restrictive environment is violated in the extreme by removing this child from her natural family so that she might attend an institution alleged to have a better program than the public school setting." *Id.* at 42a.

3. *Judicial Proceedings*: In July 1986, over eight months after the hearing officer issued his decision and after Shannon had completed the tenth grade at Trident Academy, her parents filed suit on her behalf in the United States District Court for the District of South Carolina. The complaint alleged that the school district had failed to offer Shannon a "free appropriate public education" within the meaning of the Act. In addition, it alleged that the school district failed to comply with the Act's procedural requirements, thereby invalidating the IEP. Pet. App. 34a. Shannon's parents sought actual damages and retroactive

reimbursement for tuition and other costs associated with educating Shannon at a distance from home.

The district court, following an evidentiary hearing, concluded in an unpublished opinion that the school district had fulfilled all of the procedural requirements of the Act. Pet. App. 35a. However, the court found that the school district had failed to provide Shannon with a "free appropriate public education" under the Act. Pet. App. 36a. Central to the court's determination were the limited goals of the IEP; even if met, according to the court, Shannon would not be performing at grade level. *Id.* The court also found that the education offered at Trident had been appropriate for Shannon, based on expert testimony that, *inter alia*, Trident had "done a good job" of meeting Shannon's needs. Pet. App. 29a. The court concluded that the expenses incurred in sending her there -- which totalled more than $35,000 over a three-year period for tuition and fees, room and board, and trips to her home -- were reasonable. The court noted that "the defendant has offered no evidence that Shannon could have received the special educational services provided by Trident at any facility closer to her home or at a lower cost." Pet. App. 30a (footnote omitted). Accordingly, it ordered the school district to provide reimbursement for these costs. *Id.* at 39a.

On appeal, the Court of Appeals for the Fourth Circuit affirmed the district court's finding that the School District's program was inappropriate. Turning to the question of reimbursement, the court looked to this Court's decision in *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359 (1985), which ordered the retroactive reimbursement of parents who, presented with a public school placement that did not meet the requirements of the Act, unilaterally placed their child in a private school that did. Pet. App. 10a-11a. Unlike *Burlington*, however, where the school in which the student was unilaterally placed by his parents was a "state-approved private school for special education," 471 U.S. at 362, and therefore met the requirements of a FAPE, the court below acknowledged that

Trident Academy was not approved. Pet. App. 11a-12a.[5] In fact, Trident *could not* receive State approval because it employed uncertified teachers in violation of State law, and failed to implement IEPs as required by the Act. J.A. 13, 16.

Nonetheless, the court of appeals found that this failure of Trident to meet the statutory definition of a FAPE was not "fatal to the request for reimbursement." Pet. App. 12a. The court did recognize conflicting decisions among the courts of appeals on the precise question before it: whether reimbursement is proper under the Act for a private school chosen by the parents that does not have state approval. Pet. App. 15a. Rejecting the position taken by the Second Circuit in *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563 (2d Cir. 1989), the court construed the language of 20 U.S.C. § 1413(a)(4)(B), which addresses the elements of a State Plan, as requiring private schools to meet basic State "educational standards" and the Act's IEP requirement only when the state places the child in the private school but not when parents effectuate the placement. Pet. App. 13a. The Court held that where parents act on their own and the "public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits,' *Rowley*, 458 U.S. at 207 -- the same standard by which the appropriateness of a public school's IEP is assessed." *Id.* at 16a-17a. The court stated that permitting reimbursement only as to state-approved private schools "would undermine the values and policies [of] the Act." *Id.* at 17a.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, requires states that receive federal funds

[5] The court noted that, at the time of trial, at least two faculty members at Trident, including one of Shannon's teachers, were not certified by the State of South Carolina. Pet. App. 11a.

for education of disabled children to provide such children with a "free appropriate public education," ("FAPE") 20 U.S.C. § 1412(1), a standard that is explicitly defined in the Act. 20 U.S.C. § 1401(a)(18). In order to satisfy the FAPE requirement for each disabled child, the state must provide an education that meets existing state educational standards, and that utilizes an "individualized educational plan," which this Court has described as the "*modus operandi* of the Act." *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359, 368 (1985). *See also Honig v. Doe*, 484 U.S. 305, 311 (1988) (Congress envisioned the IEP as "the centerpiece of the statute's education delivery system"). In working toward an appropriate placement for each child, the Act requires a "cooperative approach" between parents and school officials. *Burlington*, 471 U.S. at 368.

In this case, respondents initially worked with school officials in the formulation of an IEP, but thereafter determined to remove Shannon Carter from the public school and to place her in Trident Academy. This action was taken without inquiring further of local or state education officials as to whether Trident would in fact meet the statutory requirements of a FAPE, and the court below stated in its opinion that Trident in fact failed to meet two of those requirements. Pet. App. 11a-12a. Notwithstanding that fact, the court below concluded that respondents were entitled under the IDEA to receive full reimbursement for the costs of Shannon's attendance at Trident Academy. Pet. App. 12a.

In so holding, the court overrode the clear meaning of the statute, violated the fundamental principle that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges," *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988), and greatly impaired the financial ability of public school authorities to assure an appropriate education to all students.

ARGUMENT

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT PROVIDES NO LEGAL BASIS FOR COURT-ORDERED PUBLIC FUNDING OF A UNILATERALLY SELECTED PRIVATE SCHOOL PLACEMENT THAT FAILS TO MEET STATE EDUCATIONAL STANDARDS OR UTILIZE THE IEP PROCEDURE

The primary purpose of the Individuals with Disabilities Education Act is to "assure that all children with disabilities have available to them . . . a free appropriate public education." 20 U.S.C. § 1400(c). It pursues this goal by providing federal financial assistance to states that agree to comply with the requirements of the Act, including the requirement that they demonstrate to the Secretary of Education that they have "in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(1). The statute in turn defines "free appropriate public education" as "special education and related services" that:

> (A) have been provided at public expense, under public supervision and direction, and without charge,
> (B) meet the standards of the State educational agency,
> * * *
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18).

The provision of a FAPE to each disabled student is to be accomplished principally through formulation and implementation of an IEP, which is the product of close cooperation between the school authorities and the child's parents. *See, e.g.*, 20 U.S.C. §§ 1401(a)(20), 1412(7), 1414(a)(1)(C)(iii), 1415(a)-(b). Where possible, the FAPE is to be provided within the public school setting, with the child participating as much as possible in the same activities as non-disabled children. 20 U.S.C. § 1412(5). If the public schools themselves are unable to provide the necessary services, the Act provides for placement in an appropriate private school at governmental expense. *Burlington*, 471 U.S. at 369. Even where a private school or facility implements a child's individualized education program, responsibility for compliance with the statute remains with the public agency. 34 C.F.R. § 300.347(c).

In *Burlington*, this Court addressed the difficult circumstance where parents believe that their child is not receiving an appropriate education in the public school and elect to place him in a private school. The Court held that under the authority conferred on courts by the IDEA to "grant such relief as the court determines is appropriate," 20 U.S.C. § 1415(e)(2), such parents may recover reimbursement for the cost of unilaterally placing their child in a private school, provided that the "court determines that a private placement desired by the parents was proper under the Act and that the IEP calling for placement in a public school was inappropriate." 471 U.S. at 370. In *Burlington*, where the school selected by the parents had been approved by the state for special education, *id.* at 362, it was undisputed that the private school placement was "proper under the Act," as one which the state itself could have initiated.[6] The issue presented here is whether the IDEA offers a basis in federal law for a court to order public funding of a private education unilaterally selected by parents which, unlike the private placement in *Burlington*, does not meet the statutory definition of a FAPE.

The court below was explicit in stating that the Trident Academy placement failed to provide Shannon Carter with a FAPE in two respects. *First*, the court of appeals noted that

---

[6] Indeed, the Court in *Burlington* noted that it was "merely requir[ing] the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." 471 U.S. at 370-71.

Trident employed faculty members -- including one of Shannon's teachers -- who were not certified by the State, Pet. App. 11a-12a,[7] and thus failed to satisfy the requirement of Section 1401(a)(18)(B) that the education must "meet the standards of the State educational agency." *Second*, the court of appeals noted that Trident "does not attempt to comply with the terms of the Act," in that it failed to provide services in conformity with the individualized education program required under section 1414(a)(5). Pet. App. 11a.

In holding that respondents were nonetheless entitled to reimbursement, the court below pushed aside the Act's core requirement of a FAPE and its mandate of cooperative interaction of parents and public school authorities.[8] Instead, it ruled that once school authorities have offered a placement that fails to meet the requirements of the Act, the parents enjoy not only the right under *Burlington* to make a unilateral private school placement, but are entitled to reimbursement for that placement whether or

---

[7] South Carolina's State Board of Education regulations require that private schools in which handicapped children have been duly placed conform with the Defined Minimum Program for South Carolina School Districts ("DMP"). S.C. Code Regs. 43-243(E)(7). The DMP expressly requires that a teacher of handicapped children for grades 9-12 be "certified or hold a permit in the area of handicapping condition in which the majority of the pupils are served." S.C. Dep't of Education, *Defined Minimum Program for South Carolina School Districts*, at 52 (1986), Pet. App. 71a-72a. South Carolina law sets forth explicit educational prerequisites to certification to teach children with particular types of handicaps. S.C. Code Regs. 43-62(K). Pet. App. 62a-71a.

[8] In doing so, the court below violated the principle that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The IDEA contains no condition -- and certainly no unambiguous condition -- requiring states to fund *Burlington*-type placements apart from the explicit statutory obligation to provide a FAPE.

not it satisfies state educational standards or implements the statute's IEP requirement. For the court below, once the state has itself failed to provide an appropriate placement, the explicit elements of the FAPE requirement are no longer operative. In particular, the state's educational standards and the IEP requirement become irrelevant to the issue of reimbursement; it is simply enough that the private school placement is "reasonably calculated," in the view of a court, "to enable the child to receive educational benefits." Pet. App. 17a.

This conclusion is most obviously flawed as a straightforward matter of statutory language. As this Court has recognized, "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992). The state's obligation under the statute is to provide a FAPE, and the placement selected by respondents is concededly not that. That lack of ambiguity in the statute's language instructs that the "judicial inquiry is complete." *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

One looks in vain through the provisions of the IDEA for language justifying compulsory public funding of such an education that falls short of the statute's explicit requirements. Nor is this quest assisted at all by the maxim that the provisions of a statute must be reconciled with its express overall purpose. *See Federal Power Comm'n v. Panhandle Eastern Pipe Line*, 337 U.S. 498, 514 (1949); *Shapiro v. United States*, 335 U.S. 1, 31-32 (1948). *See also* discussion at pp. 22-24, *infra*.

Such reasoning cannot be justified, as the court below sought to do, on the ground that it utilizes the same test used in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), to evaluate a public school student's IEP -- that is, whether the placement was

"reasonably calculated to provide educational benefits."[9] There, that deferential standard was adopted by this Court precisely because the procedural requirements of the statute -- including the IEP requirement and the cooperative efforts of parents and school authorities, guided as they are by experience and state educational standards -- were seen as the primary means by which the goals of the Act are to be achieved.[10] But the lax standard of review for an IEP makes no sense where the statute's substantive and procedural requirements are rendered inoperative by a court of

---

[9] Specifically, the court below stated:

> [W]hen a public school system has defaulted on its obligations under the Act, a private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits," *Rowley*, 458 U.S. at 207 -- the same standard by which the appropriateness of a public school's IEP is assessed.

Pet. App. 16a-17a.

[10] As the Court in *Rowley* stated:

> We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

458 U.S. at 206. In the face of these and other procedural requirements, and in order to prevent courts from "imposing their view of preferable educational methods upon the States," *id.* at 207, the Court adopted the deferential test applied by the court of appeals in this case:

> [A] court's inquiry in suits brought under § 1415(e)(2) [seeking review of an IEP] is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Id. at 206-207.

appeals decision holding that they do not apply to a unilateral *Burlington*-type parental placement.

Reimbursement in the event of a unilateral, *Burlington*-type placement that fails to provide a FAPE is not made any more compelling by the remedial overlay of 20 U.S.C. § 1415(e)(2), authorizing courts to "grant such relief as the court determines is appropriate." It is precisely that provision which this Court construed in *Burlington*, when it stated that "[a]bsent other reference, the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act . . . . principally to provide handicapped children with a 'free appropriate public education and related services . . . designed to meet their unique needs.'" 471 U.S. at 369 (quoting 20 U.S.C. § 1400(c)).

On its face, this goal is not furthered by requiring public funding under the Act of an education that is not a FAPE. In the present instance, such action defeats essential, explicit legislative objectives, by authorizing a publicly funded special education that fails to utilize the IEP process and ignores educational standards adopted for general application throughout the State. As made clear in *Rowley*, the IEP and other procedural elements of the statute are central and not dispensable to the statutory scheme. *See* 458 U.S. at 205-206. And Congress certainly did not intend to create a federally funded program that eliminated state educational standards.[11]

---

[11] The words of the statute indicate an intent by Congress to apply a universal definition of FAPE throughout the Act. According to section 1401(a)(18), "free appropriate public education *means* special education and related services that" fulfill four requirements, including the obligation to meet the standards of the state educational agency. "As '[a] rule, a definition which declares what a term "means" [as compared to what a term includes] . . . excludes any meaning that is not stated.'" *Colautti v. Franklin*, 439 U.S. 379, 392-93 n.10 (1979) (quoting 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978)).

Thus, viewed prospectively, the court of appeals' approach greatly undermines the future effectiveness of the statute by offering both opportunity and incentive to parents in a *Burlington* situation to proceed without any consultation as to state educational standards and without concern to adhere to the IEP process. *See* p. 24, *infra*. While the remedial provision of the statute is indeed "a broad grant of equitable power designed to provide courts maximum flexibility in effectuating the statutory objectives," *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 919 (1st Cir. 1983) (quoted in Pet. App. 18a), it offers no grounds to ignore explicit statutory requirements that are critical to the legislative scheme. *See, e.g.*, Sutherland, *Stat. Const.* § 27.02 (4th ed. 1985 Revision).

In its decision, the court below attached particular significance to the language of 20 U.S.C. § 1413(a), which sets forth the "requisite features" of the State Plan to be submitted to the Secretary of Education by the educational agency of any state desiring to receive funding under the IDEA.[12] The court

---

[12] Specifically, the court of appeals turned its attention to section 1413(a)(4)(B). Pet. App. 12a. That section states in pertinent part that:

> Each such plan shall –
>
> * * *
>
> (4) set forth policies and procedures to assure -
>
> * * *
>
> (B) that –
>
> (i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency . . .; and
>
> (ii) in all such instances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies. . . .

Pet. App. 58a.

concluded from this language that the "requirement that private schools receiving funds under the Act meet state educational standards[ ] would apply only when the child is placed in the private school by the state or local school system" and that "[t]he Act itself simply imposes no requirement that the private school be approved by the state in parent-placement reimbursement cases." Pet. App. 13a.

This conclusion is not supported by the language of § 1413(a)(4)(B).[13] That section was enacted -- in its current form for all relevant purposes -- as part of Public Law 94-142, 89 Stat. 773, on November 29, 1975.[14] At that time, of course, the statute contained a provision, as it does today, stating that:

> During the pendency of any proceedings [seeking review of an IEP] conducted pursuant to [§ 1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . .

20 U.S.C. § 1415(e)(3). It was not until ten years later, in 1985, that this Court in *Burlington* addressed the issue of whether parents who unilaterally withdraw their child from a public school

---

[13] As one commentator has noted, "it seems counterintuitive to suggest that the state is prohibited from paying for a private school education if public officials have placed a disabled child in an unapproved school, but the state is compelled to reimburse parents when they unilaterally place their child in the same school." Jerry Parkinson, *Parents' Unilateral Placement of a Disabled Child in an Unapproved Private School: A "Free Appropriate Public Education"?*, 76 Educ. L. Rep. 893, 908 (1992).

[14] Section 1413(a)(4)(B) has been subsequently amended only to change references to "handicapped children" to "children with disabilities." *See* Pub. L. No. 101-476, 104 Stat. 1103 (1990).

before exhausting review procedures may ever receive reimbursement with public funds.[15]

Thus, at the time that the language of § 1413(a)(4)(B) was drafted, it is likely that the drafters did not even have in mind the eventuality presented by *Burlington* and this case, of parents unilaterally withdrawing their child before review proceedings were completed. Any inference -- by negative implication from the failure of § 1413(a)(4)(B) to address that circumstance -- of intent to modify the statute's explicit FAPE requirement is thus not persuasive.

Even if one could fairly suppose that the drafters of section 1413(a) contemplated the *Burlington* possibility of unilateral parental placements due to dissatisfaction with the public school offering, § 1413(a)(4)(B) does not support the court of appeals' conclusion because it does not purport to qualify or address in any way the explicit statutory obligation of participating states to assure to each disabled student a FAPE. Section 1413(a), rather, deals with what must be included in the Plan that each state must submit as a condition of its participation in the program. Relating as it does to the State Plans and not to the overall statutory obligation to provide a FAPE, § 1413(a)(4)(B) cannot be viewed as a more specific provision relating to the FAPE requirement, on which basis the general obligation to provide a FAPE, set forth in §§ 1401(a)(18) and 1412(1), could be modified.

In any event, it is clear under the statute that states are required, as a condition of eligibility, to demonstrate that they have developed a Plan which "shall set forth in detail the policies and procedures which the State will undertake or has undertaken

---

[15] The Court in *Burlington* held that § 1415(e)(3), while not foreclosing a unilateral parental placement, operates in such a way that where parents take that action, they will not be reimbursed if the court ultimately determines that the original placement was appropriate. 471 U.S. at 373-374.

in order to assure that . . . a free appropriate public education will be available *for all children with disabilities*." 20 U.S.C. § 1412(2)(B) (emphasis added). Based on this and other language scattered throughout the statute, there can be no argument that the FAPE requirement is rendered inapplicable by the language of § 1413(a)(4)(B) in the case of a unilateral parental placement at public expense. *See* 20 U.S.C. § 1412(3) (State must demonstrate to the Secretary that it "has established priorities for providing a FAPE *to all children with disabilities*") (emphasis added); § 1414(a)(1)(C)(ii) (local educational agency seeking federal funding shall provide assurance that such payments will be used to fund, *inter alia*, "the provision of, and the establishment of priorities for providing, a free appropriate public education *to all children with disabilities*") (emphasis added); § 1414(e) (state may reallocate funds from one local education agency only upon determining that that agency "is adequately providing a free appropriate public education *to all children with disabilities* residing in the area served by such agency") (emphasis added).

Accordingly, based on the language of the IDEA, it can only be read as imposing on states an obligation to provide a FAPE as that term is defined in the statute. Neither the statute's remedial provision, § 1415(e)(2), nor the language of § 1413(a)(4)(B) setting out required elements of the State Plan, offer any legal basis for a court to compel funding, in these circumstances,[16] of a private placement unilaterally selected by parents that does not conform to the FAPE requirement that is at the heart of the Act.

---

[16] This case does not present the more difficult question raised where school authorities so conduct themselves as to prevent parents from learning whether state educational requirements are satisfied by a particular private school. *See* pp. 25-26, *infra*.

II. COURT-ORDERED PUBLIC REIMBURSEMENT OF PARENTS FOR A UNILATERAL PRIVATE SCHOOL PLACEMENT THAT FAILS TO MEET STATE STANDARDS OR PROVIDE AN IEP IS CONTRARY TO THE PURPOSES OF THE IDEA

A. The Decision Below Undermines The Role Of The States As The Primary Educational Authority In Formulating Policy In Cooperation With Parents

In what this Court termed a "clear statutory directive," Congress, in the IDEA, left "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs . . . to state and local educational agencies in cooperation with the parents or guardian of the child." *Rowley*, 458 U.S. at 207.[17] At the same time, Congress specifically intended in the IDEA to foster interaction and cooperation between parents and school authorities. *See id.* at 206 (noting Congress' "emphasis upon full participation of concerned parties throughout the development of the IEP"); *Burlington*, 471 U.S. at 368 (parents and school officials must work together in a "cooperative approach"). Indeed, cooperation and consultation between parents and school officials in developing the child's program and assessing its effectiveness are at the core of the Act. *See* 20 U.S.C. §§ 1400(c), 1401(a)(20), 1415(b)(1)(A),(C),(D),(E), and 1415(b)(2); 34 CFR § 300.345.[18]

---

[17] Congress, in passing the Act, "was aware of the states' traditional role in the formulation and execution of educational policy." *Rowley*, 458 U.S. at 207 n.30. In fact, Congress took pains in enacting the Act not to "displace the primacy of states in the field of education" but rather "to assist them in extending their educational systems to the handicapped." *Id.* at 208.

[18] Thus, for example, parents must attend meetings with school officials to formulate an IEP as defined by the Act. 20 U.S.C. § 1401(a)(20). This interwoven scheme of consultation was deliberately designed by Congress to "provide for an ongoing process of consultation and comment by interested individuals and organizations . . . ." S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1448.

This statutory vision of primary responsibility residing in state and local school agencies, and a cooperative interaction between them and parents, is incompatible with the holding of the court below. For under that decision, once the public agency provides a placement that is inappropriate under the Act, parents are freed to pursue a private placement, at public expense, without further consultation of the state or regard for state educational standards or the IEP requirement of the Act.[19]

The issue here, on the one hand, involves proper recognition of state authority. The IDEA clearly did not contemplate a construction that displaces the states wholesale from participation in the expenditure of public special education funds in a substantial category of cases. The substitution of the courts -- and especially the federal courts -- as the arbiter of first and last resort on the propriety of *Burlington*-type parental placements is completely out of keeping with the spirit as well as the letter of the Act. *See Rowley*, 458 U.S. at 208 (noting that courts "lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy'") (quoting *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)). Accordingly, this Court has cautioned lower federal courts *not* "to substitute their own notions of sound educational policy" for those of school authorities. *Rowley*, 458 U.S. at 206.

---

[19] The only prerequisites to public reimbursement, according to the court of appeals, are that the state failed to provide a FAPE, and that the parents' private placement be reasonably calculated to enable the child to receive educational benefits. Pet. App. 17a.

This jettisoning of state standards fundamentally violates the federalism balance so carefully struck in the Act.[20]

On the other hand, permitting parents to ignore state educational standards and the input of state officials in selecting a private placement is highly disruptive to the spirit of cooperation and consultation that is central to the IDEA. The duty of consultation, which exists under the statute throughout the process of formulating and implementing an appropriate placement, is abruptly terminated, according to the court below, by a single occurrence -- the school district's provision of a placement that is ultimately found to be inappropriate. The liberating effects of that occurrence -- not only from the duty of consultation, but from any requirement of compliance with state standards or adherence to the IEP process -- are likely to give it watershed significance in the minds of parents motivated by their own purposes. The opportunity to escape the constraining procedural and substantive mandate of the Act is likely to be a vehicle of major mischief to many parents wishing to fulfill their own personal vision of the "best" for their children at public expense. Thus, the impairment of cooperation under the Act is probably not limited to those cases where parents in fact undertake a unilateral placement. The existence of this "loophole" in the statute's otherwise clear mandate is likely to affect some parents' approach to the IEP process as a whole.[21]

It is also clear that the approach of the court below cannot be justified on the theory that adherence to the requirements of the

---

[20] Justice O'Connor has remarked that "[p]rinciples of federalism inherent in our constitutional system" and "the principle of grantee autonomy" apply with special force when federal grant recipients are state or local governments. *Dixon v. United States*, 465 U.S. 482, 509 (1984) (O'Connor, J., dissenting).

[21] Indeed, this case may well be a good illustration of parents seeking to use the IEP process as a means of securing public funding for a private placement desired from the start. *See* pp. 6-10, *supra*.

statute is inherently unreasonable and burdensome in those cases where a public school placement is found wanting. The inappropriateness of one placement does not suggest that the educational standards of the state where it occurred are somehow lacking in merit. Nor does it indicate that the authorities with whom one has dealt have acted in bad faith, or are incapable or unwilling to confer on basic issues, such as the question of whether a particular private school meets standards imposed by state and federal law.

The facts of this case make it a particularly inappropriate one in which to announce a rule casting parents free to make their own choices upon the occurrence of a single failing. The school authorities allowed the Carters to handpick the special education teacher who would work with Shannon, after the Carters successfully prevailed upon the school district to provide an "itinerant" rather than a "resource room" placement. Likewise, the school district located another counselor to perform tests of Shannon's ability and achievement after the Carters registered their objections to the counselor initially chosen. In addition, the school district accepted the goals proposed by the Carters' own social worker. This was a school district intent on working with the parents to achieve the proper educational program.

Remarkably, the Carters made no inquiries of public school authorities prior to enrolling Shannon in Trident. There are no facts in the record which suggest that Shannon's parents even once requested information about appropriate private school placements; nor is there any evidence that would support an inference that the school district engaged in any wrongdoing with regard to the provision of such information.[22] Meanwhile,

---

[22] The Supreme Court in *Burlington* recognized that "equitable considerations are relevant in fashioning relief." 471 U.S. at 374. Thus, if school officials act in bad faith or refuse to cooperate in the joint effort to provide an appropriate education for disabled children, courts may remedy the situation in an appropriate fashion. But this

during the course of this litigation, Respondents have not alleged either that the school district failed to provide information about approved private schools, or that such failure provided the impetus for their decision to register Shannon at Trident Academy. Respondents simply failed to ask.

Absent a continuing responsibility on the part of parents and school authorities to confer even minimally, the IDEA is likely to become a vehicle for serious disruption in the formulation of special education policy. Parents may have a variety of reasons -- many of them unrelated to educational merit -- for preferring to circumvent rather than capitalize on public school services and for desiring to send a child to a certain private school. Parents are certainly free to consider such factors when they are paying for the education of their child, but they cannot engage in such "cherry-picking" under the sponsorship of the IDEA. Limiting reimbursement to state-approved schools otherwise satisfying the requirements of a FAPE, mandating continued communication and cooperation, and preserving state authority over statutory compliance are essential if the IDEA is not to become a vehicle of educational disruption.

B. The Decision Below Threatens The Financial Health Of The Public School System

The decision below also threatens the school district's ability to function equitably, or perhaps at all. The financial impact on school districts of what essentially amounts to a judicially-imposed, discriminatory voucher system is well-illustrated by this case. The average per pupil expenditure in Florence County School District Four is $4,102.56, *see* S.C. Dep't of Education, *Ranking of the Counties and School Districts of South Carolina 1990-91* at 233, Table 87 (1992); here, the costs to the school district of educating Shannon Carter at Trident -- including

---

record contains no allegations of bad faith on the part of the school authorities.

tuition, travel costs associated with visits home, and room and board -- amounted to nearly $12,000.00 per year. While there are surely instances where expenditures of such magnitude are required, they must be undertaken with care. Parents in the *Burlington* situation must not be left free of virtually all constraints to select any private education of their choice, so long as it meets the minimal requirement of allowing the child to receive educational benefits. School "resources are not infinite and many other demands compete for limited public funds." *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1583 (D.C. Cir. 1984). Every dollar paid to reimburse the Carters for Shannon's private education is one less dollar available to the students of this rural, low-income district.

Meanwhile, state obligations under the IDEA are increasing as both the number and percentage of students with disabilities under the IDEA have steadily risen since 1976 -- close to 5 million children were served under the IDEA during the 1990-91 school year, an increase of 2.8 percent over the previous school year. U.S. Dep't of Education, *Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, at xvii (1992). Notwithstanding the expectation of a significant federal contribution to funding the IDEA, *see* S.Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1439, the federal government has played only a minimal role in actually providing funds for children with disabilities. For fiscal year 1992, the average federal contribution under the IDEA state grants program was approximately $409.00 per child. U.S. Dep't of Education, *Individuals with Disabilities Education Act: Program-Funded Activities, Fiscal Year 1992*, at 4 (1992). Federal funds thus cover just 7 percent of the average excess cost of educating a child with disabilities in the United States. U.S. Dep't of Education, *Justifications of Appropriation Estimates to the Congress, Fiscal Year 1994*, at F-19 (1993).

Education is easily the largest of all state expenditures; in 1990, spending for education comprised 32 percent of all state

government spending. Council of State Governments, *The Book of the States 1992-93*, at 368 (1992). Yet having dedicated a large portion of their revenue to educational spending, most state governments -- now facing their worst financial crisis in decades -- are ill-equipped to shoulder the extra cost of funding for inappropriate placements. The state of the states' fiscal health may have reached a new low-water mark last year: in fiscal year 1992, 31 states reported that tax collections fell below the projections used to make up their budgets; 29 states raised taxes; and 35 states were forced to cut spending at least $5.7 billion below levels initially approved in 1992. Chris Pipho, *Fiscal Gridlock*, Educational Finance, Feb. 1993, at 430. Additionally, state government indebtedness at the end of fiscal year 1990 totaled $318.3 billion, up 7.7 percent from the previous year. *Book of States 1992-93*, at 369. During the next decade, education will thus be competing more keenly than ever with other state programs for the modest amounts of new state revenues.

At the same time, the federal share of education funding overall -- including funding for all public elementary and secondary school education -- has dropped in the last decade, from 10 percent in 1980 to 6.1 percent in 1990. Jay Taylor, *Desperate for Dollars*, The American School Board Journal, Sept. 1992, at 21. Additionally, along with reductions in its discretionary aid to state governments, Congress has increasingly passed the costs of policy initiatives on to state governments in the form of mandated programs, creating additional demands on state treasuries. The Omnibus Budget Reconciliation Act of 1990 alone added more than $13.3 billion in additional costs to state and local governments. Martha Fabricius, *More Dictates From the Feds*, State Legislatures, Feb. 1991, at 28.

In short, the judicially-compelled, public funding of private education, on facts like those presented here, not only is contrary to the letter and spirit of the IDEA -- it is also seriously disruptive to the ability of states to carry the fiscal burden of an appropriate public education for all children.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

Of Counsel

BRUCE E. DAVIS
1704 Fair Street
Camden, S.C. 29020
(803) 432-2880

DONALD B. AYER
(Counsel of Record)
BETH HEIFETZ
DAVID A. YALOF
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioners

April 29, 1993

Supreme Court, U.S.
FILED
JUN 18 1993
OFFICE OF THE CLERK

(10)

No. 91-1523

In the
Supreme Court of the United States

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,
Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

BRIEF FOR RESPONDENTS

Nancy C. McCormick
South Carolina Protection and Advocacy System for the Handicapped, Inc.
3710 Landmark Drive
Columbia, S.C. 29204
(803) 782-0639

Peter W.D. Wright
Counsel of Record
Courthouse Commons
4104 East Parham Road
Richmond, Va. 23228
(804) 755-3000

Counsel for Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a court exercising its broad discretion to award appropriate relief under 20 U.S.C. § 1415(e)(2) may order a school system that has defaulted on its obligation to provide a free appropriate public education to a child with disabilities to reimburse her parents for the cost of a substitute private placement "proper under the Act," irrespective of whether the private placement meets the technical requirements that the IDEA imposes on State and local educational authorities when they place children in private schools.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 2

SUMMARY OF ARGUMENT 12

ARGUMENT 13

I. The Relief Authorized by the Decision Below is Consistent with 20 U.S.C. § 1415(e)(2) and this Court's Decision in *Burlington* 13

A. The Standard for Reviewing a Parent's Unilateral Educational Placement was Previously Decided by this Court in *Burlington* 14

B. The Fourth Circuit Correctly Interpreted *Burlington* and *Rowley* in Determining that the Private Placement Selected by Respondents Was "Proper under the Act" .. 17

C. The Decision Below Wisely Declines to Abrogate the *Burlington* Remedy in South Carolina and Other States That Fail to Provide A Mechanism By Which Parents Can Ascertain Whether A School Meets State Standards 21

D. The Fourth Circuit Appropriately Concluded that 20 U.S.C. § 1413(a)(4)(B) Does Not Limit the Court's Remedial Authority to Grant Tuition Reimbursement . 24

E. The Relief Awarded Below Was Appropriate as Equitable Restitution 25

II. The Terms of 20 U.S.C. § 1401(a)(18) Cannot Logically Be Applied to A Placement Made By a Parent In the Face of School District Opposition .. 28

III. 20 U.S.C. § 1415 and the Decisions of This Court Preclude the Curtailment of Judicial Remedial Authority Urged By Petitioner 31

A. Courts Acting Under § 1415(e)(2) Have Broad Authority to Grant Appropriate Relief Based Upon the Nature and Scope of the Violation Committed 31

B. Limiting Remedial Authority to an Order Requiring A Local Education Agency to Provide a Free Appropriate Public Education as Defined by § 1401(a)(18) Would Eviscerate Judicial Enforcement of IDEA and Negate the Right of Parents Under § 1415(b) to Obtain Relief in "Any Matter" Concerning the Education of Children with Disabilities ... 36

IV. The Threats to Public Education and State Educational Authority Envisioned By Petitioner Are Illusory 39

CONCLUSION 44

TABLE OF AUTHORITIES

Cases **Page**

Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986) 20, 35, 42

Antkowiak v. Ambach, 838 F.2d 635 (2d Cir.), *cert. denied sub nom. Doe v. Sobol*, 488 U.S. 850 (1988) 20, 23

Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982) . . . . *passim*

Carrington v. Commissioner of Education, 535 N.E.2d 212 (Mass. 1989) 21

Clevenger v. Oak Ridge School Board, 744 F.2d 514 (6th Cir. 1984) 40

Dellmuth v. Muth, 491 U.S. 223 (1989) 34

Fagan v. District of Columbia, No. 90-0371, 1993 WL 96965 (D.D.C. Mar. 25, 1993). 21

Franklin v. Gwinnett County Public Schools, __ U.S. __, 112 S.Ct. 1028 (1992) 13, 33

Garcia v. United States, 469 U.S. 70 (1984) 25

Garland Independent School District v. Wilks, 657 F. Supp. 1163 (N.D. Tex. 1987) 21, 36

Greer v. Rome City School District, 950 F.2d 688 (11th Cir. 1991), *opinion withdrawn*, 956 F.2d 1025 (1992, *reinstated*, 967 F.2d 470 (1992) . . . 36

Hacienda La Puente Unified School District v. Honig, 976 F.2d 487 (9th Cir. 1992) 39

Hall v. Cole, 412 U.S. 1 (1973) 26

Hampton School District v. Dobrowolski, 976 F.2d 48 (1st Cir. 1992) 42

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 26

Honig v. Doe, 484 U.S. 305 (1987) 15, 33, 38, 41

Irving Independent School District v. Tatro, 468 U.S. 883 (1984) 39

Livingston v. DeSoto County School District, 782 F. Supp. 1173 (N.D. Miss. 1992) 42

Metropolitan Railroad v. District of Columbia, 132 U.S. 1 (1889) 26

Milliken v. Bradley, 433 U.S. 267 (1977) 34

Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972) 40

Muth v. Central Bucks School District, 839 F.2d 113 (3d Cir. 1988), *rev'd on other grounds sub nom. Dellmuth v. Muth*, 491 U.S. 223 (1989) 39

Oberti v. Board of Education of Clementon School District,
801 F. Supp. 1392 (D.N.J. 1992), *aff'd*, No. 92-5462,
1993 WL 178480 (3d Cir. May 28, 1993) 36

Oneida Indian Nation v. County of Oneida,
719 F.2d 525 (2d Cir. 1983),
rev'd on other grounds, 470 U.S. 226 (1985) 27

Pennhurst State School and Hospital v. Halderman,
451 U.S. 1 (1981) 33

Pennsylvania Ass'n of Retarded Children (PARC)
v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971),
modified, 343 F. Supp. 279 (1972) 40

Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 25

Roland M. v. Concord School Committee, 976 F.2d 983
(1st Cir. 1990), *cert. denied*, 111 S.Ct. 1122 (1991) 42

School Committee. v. Department of Education,
471 U.S. 359 (1985) (*Burlington*) . . . . . *passim*

Shirk v. District of Columbia,
756 F. Supp. 31 (D.D.C. 1991) 21

Smith v. Robinson, 468 U.S. 992 (1984) 13, 33, 41

Straube v. Florida Union Free School District,
778 F. Supp. 774 (S.D.N.Y. 1991) 23

Thornock v. Boise Independent School District No. 1,
767 P.2d 1241 (Idaho 1988), *cert. denied*,
490 U.S. 1068 (1989) 21

Tice ex rel. Tice v. Botetourt County School Board,
908 F.2d 1200 (4th Cir. 1990) 18

Town of Burlington v. Department of Education,
736 F.2d 773 (1st Cir. 1984),
aff'd, 471 U.S. 359 (1985) 42

Tucker v. Bay Shore Union Free School District,
873 F.2d 563 (2d Cir. 1989) 19, 23

TVA v. Hill, 437 U.S. 153 (1978) 25

United States v. P/B STCO 213, ON 527 979,
756 F.2d 364 (5th Cir. 1985) 27

Virginian Railway v. System Federation No. 40,
300 U.S. 515 (1937) 26

W.G. v. Board of Trustees of Target Range School
District No. 23, 960 F.2d 1479 (9th Cir. 1992) 21, 39

Constitution

U.S. Const. amend. XI 34

U.S. Const. amend. XIV 33

Statutes

Individuals with Disabilities Education Act,
20 U.S.C. §§ 1400 - 1485 (1988 & Supp. III 1991) 4

20 U.S.C. § 1400(a) 15
20 U.S.C. § 1400(c) 13, 14, 38
20 U.S.C. § 1401(a)(18) . . . . . *passim*

20 U.S.C. § 1401(a)(20) . . . . . *passim*
20 U.S.C. § 1403 34
20 U.S.C. § 1412 5
20 U.S.C. § 1412(5) 17
20 U.S.C. § 1412(6) 43
20 U.S.C. § 1412 - 1414 23
20 U.S.C. § 1412 - 1416 34
20 U.S.C. § 1413(b) 14
20 U.S.C. § 1413(a)(4) . . . . . *passim*
20 U.S.C. § 1414(a)(5) 28, 29
20 U.S.C. § 1415 . . . . . 31, 42
20 U.S.C. § 1415(b) 14, 15, 38
20 U.S.C. § 1415(d) 15
20 U.S.C. § 1415(e) 15
20 U.S.C. § 1415(e)(2) . . . . . *passim*
20 U.S.C. § 1415(e)(3) . . . . . *passim*

20 U.S.C. § 1681(a) (Title IX of the Education Amendments of 1972) 33, 34

42 U.S.C. § 6010 (1975) (Developmentally Disabled Assistance and Bill of Rights Act) 33

S.C. Code § 59-33-50 (Law. Co-op. 1976) 8, 24

Rules and Regulations

34 C.F.R. § 300.132 (1992) 17
34 C.F.R. § 300.227 (1992) 17
34 C.F.R. § 300.307(b) (1992) 17
34 C.F.R. § 300.343(d) (1992) 19
34 C.F.R. § 300.347 (1992) 17, 24, 30
34 C.F.R. § 300.400 - 300.403 (1992) 24
34 C.F.R. § 300.510(b) (1992) 10
34 C.F.R. § 300.541 (1992) 3

34 C.F.R. § 300.551(a) (1992) 25

S.C. Code Regs. 43-243(E) (1992) 8, 22, 23

S.C. Code Regs. 43-243(E)(7) (1992) 22, 24

S.C. Code Regs. 43-259 (1992) 9

South Carolina Department of Education, Defined Minimum Program for South Carolina School Districts (1986) 10, 22

Legislative History

Education of the Handicapped Amendments, Hearing on H.R. 4199 Before the Select Subcomm. of the House Comm. on Education and Labor, 93rd Cong. 1st Sess. 75-76 (1973) 41

Education of the Handicapped Amendments, Hearings on S. 896, S. 6, S. 34, S. 808 Before the Subcomm. on Handicapped of the Senate Comm. on Labor and Public Welfare, 93rd Cong. 1st Sess. 183 (1973) 40

S. Rep. No. 142, 94th Cong., 1st Sess. 24 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1448 . . . . . 24, 40

S. Rep. No. 168, 94th Cong., 1st Sess. 32 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425 24

121 Cong. Rec. 23702 (1975) 38
121 Cong. Rec. 23703 (1975) 41

Miscellaneous

American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 39-48 (3d ed. rev. 1987) (DSM-III-R) 2, 7

Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103 (1979) 41

Restatement of Restitution § 76 (1936) 26

Restatement of Restitution § 113 (1936) 27

U.S. Department of Education, *Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* (1992) 40

John W. Wade, *Restitution for Benefits Conferred Without Request*, 19 Vand. L. Rev. 1183 (1966) 26

No. 91-1523

In the
Supreme Court of the United States

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,
Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

BRIEF FOR RESPONDENTS

STATEMENT

Facts

By the time she was a ninth grade student in one of the schools operated by Petitioners, Respondent Shannon Carter was functionally illiterate.[1] Shannon had experienced academic difficulties from an early age. Pet. App. 23a; C.A.J.A. 47; 358-59; 388. From the time she enrolled in the seventh grade in petitioner Florence County School District Four in 1982, she experienced continued academic failure. C.A.J.A. 358-59, 361. Mrs. Carter requested that Shannon be tested after her first semester in public school because she did not think her daughter could read. C.A.J.A. 49. Mrs. Carter's oldest child, a son who also attended public school in the petitioner district, had also been diagnosed as having developmental dyslexia. C.A.J.A. 358-59; 361; 385.[2]

After Mrs. Carter became concerned that Shannon apparently was not able to read, an educational evaluator for the district, Cecil Ray Hill, who was not certified as a school

---

[1] J.A. at 9. J.A. refers to the Joint Appendix filed in this Court pursuant to Supreme Court Rule 26. C.A.J.A. refers to the Joint Appendix filed with the Court of Appeals, copies of which were lodged by the Petitioners with the Clerk of this Court at the time the Petition for Certiorari was filed. The Petition for Certiorari is cited as "Pet. __"; "Pet. App.__" refers to the appendix to the Petition for Certiorari; Petitioner's Brief on the merits is cited as "Pet'r Br. __." Respondent's Brief in Opposition is cited as "Resp. __."

[2] The essential feature of developmental reading disorder, also referred to as dyslexia, is marked impairment in the development of word recognition skills and reading comprehension that is not explainable by mental retardation nor due to a visual or hearing defect or neurologic disorder. The disorder is more common among first degree biological relatives than in the general population. *Diagnostic and Statistical Manual of Mental Disorders* 39-48 (3d ed. rev. 1987) (DSM-III-R).

psychologist or qualified to assess students with learning disabilities, J.A. 3-4; C.A.J.A. 72, tested Shannon in February, 1983. J.A. 3-4; C.A.J.A. 65; 72. Mr. Hill testified that he did not know at the time how Shannon was performing in the classroom. J.A. 4; C.A.J.A. 71. Mr. Hill was unable to locate any records of Shannon's 1983 test results at the time of trial in 1988-89. J.A. 3; C.A.J.A. 66. His recollection was that he administered to Shannon an IQ test and an achievement test, "more likely than not" the Wechsler Intelligence Scale for Children, Revised [WISC-R] and Peabody Individual Achievement Test [PIAT]. J.A. 3; C.A.J.A. 66. He recalled that Shannon did not qualify as learning disabled because there was not a significant discrepancy between her slightly above average IQ and slightly below average achievement test result. C.A.J.A. 66-67. Instead, he thought the results indicated, "maybe slightly a slow learner, slightly on the slow side, you know." J.A. 4, C.A.J.A. 138-39. After this evaluation, which did not comply with the detailed criteria for determining the existence of a learning disability set out at 34 C.F.R. § 300.541, C.A.J.A. 70, 78, Shannon's parents were told that their daughter could do the work if she wanted to but that she lacked motivation. C.A.J.A. 49.

During the next two years Shannon continued to experience severe academic difficulties. *Id.* at 49, 385. Shannon's parents punished her for poor grades because they believed the district's conclusion that she was lazy and unmotivated. *Id.* at 49. In the spring of 1985, Mrs. Carter again requested that Shannon be tested, when she discovered that her daughter was failing most of her courses and had changed her first semester failing grades on her report card. *Id.* at 138-39; Mrs. Carter was also very concerned that Shannon appeared to be seriously depressed. *Id.* at 139.

In April, 1985, when Shannon was in ninth grade, a certified school psychologist finally diagnosed her as having a

learning disability. *Id.* at 361-63. Her evaluation indicated a verbal IQ of 81 and a performance IQ of 117; various subtests indicated reading ability levels from 4.7 grade level to a 6.8 level. *Id.* at 362, 364. These findings attested to the presence of a "serious learning disability," Pet. App. 25a, which had gone unnoticed by the school district for almost three years. Nevertheless, petitioner's evaluation described Shannon's disability as "one which is felt to have been acquired and fostered over a period of time in which [Shannon] did not apply the skills which she seems to possess." C.A.J.A. 363. All of the experts who testified at trial agreed that "absent a traumatic injury to the head, a learning disability does not naturally develop in a child who previously did not suffer from one." Pet. App. 24a n.2.

Following the evaluation, the school district offered an Individualized Education Program ("IEP") for Shannon, to which she was entitled under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401-1485 (1988 & Supp. III 1991). Petitioner proposed that Shannon be placed in the resource room at Timmonsville High School. C.A.J.A. 121, 147. On May 1, 1985 a meeting was held to discuss the district's proposal. The Carters vigorously opposed the resource room placement. J.A. 6-7, C.A.J.A. 154. Mr. and Mrs. Carter were accompanied to the meeting by Ms. Linda Summers, a psychiatric social worker whom they had hired the prior February to provide counseling services to help Shannon cope with serious depression. C.A.J.A. 38. In her professional capacity and as the individual who initially identified Shannon's disability, C.A.J.A. 386, she came to the IEP meeting to offer insight into the development of a program that might enable Shannon to receive educational benefit. C.A.J.A. 366. Ms. Summers warned district personnel that placement in the district's resource room program would further damage Shannon's self-esteem, stigmatize her, and prevent her from obtaining the individual attention she needed.

J.A. 6-7; C.A.J.A. 154.[3] Although she expressed concern that school district personnel not place unrealistic academic demands upon Shannon, whom the district had deprived of an appropriate education for more than three years, Ms. Summers very explicitly stated that she was not an educator. C.A.J.A. 119.

At the May 1, 1985, meeting, Mr. Carter specifically told district personnel that he wanted his daughter to read on a 12th grade level when she was graduated from high school. C.A.J.A. 118-19. The IEP ultimately proffered by the district covered the period May 2, 1985, to June 1986, Pet. App. 27a, and provided for less than three hours per week of special instruction.[4] The goal of the year-long IEP was for Shannon to advance in reading skills from a 5.4 grade level to a 5.8 grade level, only four months' progress. Pet. App. 5a; C.A.J.A. 346, 366. Long term goals for math likewise called for four months' progress over the

---

[3] Dr. James G. Ward, Jr., a pediatrician specializing in the treatment of learning disabilities, also testified that placing Shannon in the proposed resource room program would have been detrimental to her. C.A.J.A. 188-89.

[4] The IEP called for an itinerant model of services rather than placement in the resource room. C.A.J.A. 146, 366. The opinion of the District Court describes these programs:

> Pursuant to 20 U.S.C. sec. 1412 the South Carolina State Board of Education adopted Regulations 43-243 which at page 144 explained the difference between an itinerant program and a resource class as follows: In an itinerant program the specialist will provide continual ongoing services to handicapped pupils and teachers taught in regular classroom setting. A resource room program shall involve pupils who will remain in regular classrooms for the major part of the day and will be scheduled into the resource room for one or more periods of individualized instruction contingent on pupil's needs.

Pet. App. 26a n.7.

entire year. Pet. App. 5a; C.A.J.A. 346, 366. Ms. Lisa Free, the special education teacher who would have worked with Shannon under the district's IEP, testified that Shannon would never have been at grade reading level by the twelfth grade if the IEP goals remained at four months' improvement per school year. C.A.J.A. 296. The IEP -- with its limited services, limited expectations and unacceptably limited long-term goals[5] -- did not reflect any understanding that Shannon had a severe disability for which petitioner had denied her three years of specialized instruction and related services that might have enabled her to compensate for her disability and close the gap with her nondisabled peers. C.A.J.A. 147-48, 347. During this period of time, the Carters hired a private tutor for Shannon, enabling her grades for the final marking period of the 1984-85 school year to improve. C.A.J.A. 149-50.

Dr. Allison Grant, an independent child and adolescent psychiatrist who evaluated Shannon in July 1985, J.A. 17-18, described her symptoms as including "depressed mood, feelings of hopelessness and pessimism (especially around academics/school areas) and suicidal ruminations (contemplating cutting her wrist)." C.A.J.A. 386. These symptoms were present for a one and a half to two year period before Ms. Summer's evaluation in February 1985 -- that is, practically the entire time that Shannon was enrolled in petitioners' schools. *Id.* at. 386, 223-25. Dr. Grant's written evaluation states that Shannon was unable to utilize some of the skill areas that she possesses not because of any "lack of motivation on her part or a result of passive-resistive and manipulative behaviors, but more a result of the failures of the [school] system." C.A.J.A. 388-89. "The failure of detection and needed academic approach," according to Dr. Grant's evaluation, "clearly interfered not only with her

[5] C.A.J.A. 158, 160-61; 226; 336-37; 366.

learning/academic progress but was the major (and probably sole) factor . . . for the significant depression that she has experienced . . . as well as the family conflicts." C.A.J.A. 388. Further, the district's low expectations were "extremely detrimental" psychologically to Shannon. J.A. 19. Shannon herself stated that she was scared to ask for help from the Timmonsville school teachers because, "I was scared I was dumb, stupid." C.A.J.A. 254.

Shannon's learning disability was exacerbated by a belatedly diagnosed attention deficit disorder. C.A.J.A. 149-50; 180-81.[6] Her learning disability was so severe that in the fall of 1985, she was described by a learning disability specialist as "functionally illiterate." J.A. at 9; C.A.J.A. 173, 176. She needed an intensive multi-sensory teaching program designed for children with neurologically-based learning disabilities; this self contained program would provide a low student-teacher ratio, small classes, and intense remediation in reading and written expression. C.A.J.A. 173, 175; C.A.J.A. 187-89, 191; C.A.J.A. 388. No intensive self-contained program for students with neurologically-based learning disabilities was available at Timmonsville High School. C.A.J.A. 85; 125, 133-34, 136; 148; 354-55. The school district never offered to develop such a program to meet Shannon's educational needs, either at the school itself--the only high school in the district--or through an agreement with another school district, as authorized by South Carolina law. J.A. 25;

[6] The essential features of Attention Deficit Disorder, also referred to as Attention-Deficit Hyperactivity Disorder, are developmentally inappropriate degrees of inattention, impulsiveness, and hyperactivity. People with the disorder generally display some disturbance in each area, but to varying degrees. Symptoms typically worsen in situations requiring sustained attention, such as listening to a teacher in a classroom. Persons often give the impression of not listening or not hearing what is said. Work is often messy, and performed carelessly, impulsively and incompletely. DSM-III-R, *supra* note 2, at 50-51.

C.A.J.A. 136; 148; 191; 240; S.C. Code Ann. § 59-33-50 (Law. Co-op. 1976). As the District Court noted, the Carters were "prevented by state law from independently seeking a placement for Shannon in any public school outside of her district." Pet. App. 30a n.11.

Faced with Petitioner's refusal to provide an appropriate IEP in a public school program, Mr. and Mrs. Carter attempted to locate a private school capable of providing Shannon with an appropriate education. Unlike some other states, South Carolina does not maintain a list of private schools that are generally approved by the state as providers of special educations that meet relevant state education standards; private school placement is determined on a case-by-case basis. *See* S.C. Code Regs. 43-243(E), Resp. App. 2a-3a. Left to their own devices by Respondent, the Carters identified Trident Academy, a private school specializing in the education of students with learning disabilities. Pet. App. 28a. No process existed by which the Carters could obtain a determination from the South Carolina Department of Education as to whether Trident Academy met its standards, or by which they could have obtained the Department's approval of Trident as a placement for Shannon. Under South Carolina's regulatory scheme, private schools are approved by the Department of Education for the placement of a particular child only upon the application of a local school district wishing to make the placement at its expense. *Id.*

Shannon enrolled at Trident Academy in September 1985, at the beginning of tenth grade. Pet. App. 28a. South Carolina school districts have placed students at Trident pursuant to IDEA on at least three other occasions, as have districts in other states. J.A. 14; Pet. App. 28a; C.A.J.A. 209. The South Carolina Department of Education has never disapproved an application for placement at Trident, J.A. 14; Pet. App. 28a, which is fully accredited by the Southern Association of Colleges and Schools

and the Palmetto Association of Independent Schools. J.A. 13; C.A.J.A. 208; Pet. App. 28a.

Trident established written student goals on a quarterly basis, formulating them in much the same language as used in IEPs. C.A.J.A. 200; Pet. App. 11a. Trident also evaluated its students on a quarterly basis, in contrast to the annual review required by IDEA. Pet. App. 37a. The district court's appointed expert concluded that Trident "did a very effective job" in teaching Shannon, allowing her to advance three grade levels in reading ability in three years. C.A.J.A. 330; Pet. App. 6a-7a, 29a; see also C.A.J.A. 343-45. Shannon graduated from Trident in 1988 with a high school diploma.[7] Pet. App. 5a; District Court transcript May 9, 1989, page 130, lines 12-13.

During the time that Shannon attended Trident, two members of its teaching staff apparently lacked a particular type of teacher certification. It is unclear whether the two individuals lacked any teacher certification at all, whether they were certified elsewhere but not by South Carolina, or whether they were certified but not in special education.[8] It is also unclear whether this situation actually violated South Carolina standards, which permit schools to have up to 10% of classroom instruction time

---

[7] South Carolina awards both diplomas and certificates at the completion of the twelfth grade. A diploma indicates that the student has passed an exit examination, whereas a certificate merely indicates attendance. S.C. Code Regs. 43-259 (1992).

[8] See C.A.J.A. 195-96 (testimony of Margaret Mitchell, agreeing with statement that two Trident faculty members "are not certified teachers") and C.A.J.A. 314 (testimony of John Richardson, answering "yes" when asked if he had heard testimony that all but two of the teachers at Trident "are certificated in special education"; Dr. Richardson also stated that "in a local school district learning disability resource room placement, the great majority of other academic area teachers would not be certificated in special education.").

taught by teachers who are not properly certified. *See* S.C. Dept. of Education, Defined Minimum Program for South Carolina School Districts (1986) at 53, reprinted at Pet. App. 71a-72a. In any event, only one of the teachers in question taught Shannon, and even then only for her first year at Trident. J.A. 8, 13.[9]

PROCEEDINGS BELOW

Administrative Proceedings. Pursuant to the procedures set forth in IDEA, the Carters requested a due process hearing concerning the inadequate IEP proffered by the school district. An administrative hearing was conducted by a local hearing officer on August 20, 1985. Pet. App. 44a-55a. After the hearing officer ruled against them, the Carters exercised their right under IDEA to seek an impartial review by the state education agency. Declining to request additional evidence, despite the regulations implementing the IDEA which require a state review officer to seek additional evidence where necessary, 34 C.F.R. § 300.510(b), the state review officer affirmed the hearing decision on October 14, 1985. Pet. App. 40a-43a.

Judicial Proceedings. Following the final adverse administrative decision, Mr. Carter filed suit on behalf of his daughter, contending that petitioner had failed to provide her the free appropriate public education required by IDEA. The Carters sought a determination that the district had violated Shannon's rights under the IDEA; an award of retroactive reimbursement for the costs they had incurred in providing an appropriate education at Trident Academy; and an award of reimbursement for their

[9] Petitioner does not question the certification of any of Shannon's other first year teachers, or any of her second or third year teachers.

future expenses at Trident. C.A.J.A. 13. After a three day trial,[10] which included testimony of a court-appointed expert witness, the District Court ruled in favor of the Carters. The court found that the long-term goals set in the IEP proposed by petitioner "were wholly inadequate," Pet. App. 27a; that "the stated progress of only four months in her reading and math skills over an entire school year ensured the program's inadequacy from its inception," Pet. App. 36a; that the less than three classroom hours per week of special instruction failed to meet her educational needs; *id.*, and that "Florence County School District Four failed to provide Shannon Carter with a free appropriate public education." *Id.* The court found, in contrast, that "Trident Academy provided Shannon an excellent education in substantial compliance with all the substantive requirements of the EHA [IDEA]." Pet. App. 37a. The court also found that the tuition and fees charged by Trident were reasonable, and noted that petitioner had offered no evidence that Shannon could have received the services provided by Trident at a lower cost, or closer to her home. Pet. App. 30a. Relying upon this Court's decision in *School Committee v. Department of Education*, 471 U.S. 359 (1985) (*Burlington*) and explicitly taking into account equitable considerations, the district court held that the Carters were entitled to reimbursement for the full expense of Shannon's placement at Trident.

On appeal to the Fourth Circuit, petitioner challenged neither the district court's finding that Trident had provided Shannon with an appropriate education nor the amount of reimbursement it had ordered. Pet. App. 10a n.2. The appellate court rejected petitioner's contention that it had, in fact, provided respondent with a free and appropriate public education, finding

[10] The trial began in July 1988, Pet. App. 23a, by which time Shannon had been graduated from Trident.

that the district court had properly concluded that the petitioner's proposed IEP and placement "failed to satisfy the Act's requirement of more than minimal or trivial progress." Pet. App. 8a. The court further held that the Carters' rejection of the proposed resource room placement in favor of the itinerant program did not relieve petitioner of liability. Pet. App. 9a.

The Fourth Circuit also rejected the petitioners' contention that IDEA precluded reimbursement of the Carters' expenses because Trident had not been approved by the state for Shannon's placement and, in petitioner's view, could not have been because of questions concerning the certification of two teachers and the use of IEPs. Pet. App. 9a-12a. Interpreting *Burlington*, the Fourth Circuit held that in requiring that a private school placement be "proper under the Act," 471 U.S. at 369, in order to be reimbursable, this Court did not intend "to impose on private schools chosen by parents the whole panoply of duties that the Act imposes on the state." Pet. App. 16a. Further reasoning that "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place," Pet. App. 18a, the Fourth Circuit affirmed the judgment of the district court in its entirety. Pet. App. 19a.

SUMMARY OF ARGUMENT

The question before this Court is whether parents who place their child with disabilities in a private school which successfully provides the child the special education and related services to which she is entitled, after the public school district has failed to do so, are entitled to reimbursement for their expenses, regardless whether the private school meets the statutory definition of a free appropriate public education.

The purposes of the IDEA are to enable children with disabilities to obtain equal educational opportunities by providing necessary special education and related services and to provide remedies for violations of those rights. 20 U.S.C. §§ 1400(c); 1415(e)(2); *Smith v. Robinson*, 468 U.S. 992 (1984). Federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute. *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028, 1035 (1992). The Act accordingly allows courts wide discretion in fashioning remedies for its violation, 20 U.S.C. § 1415(e)(2), including repayment to parents for the expenses they incur in meeting the school district's obligation to provide a free appropriate public education.

The result reached by the Fourth Circuit neither encourages parents to circumvent the public education system nor threatens the public fisc. School districts can avoid being ordered to reimburse parents by providing a free appropriate public education. Parents still must be prepared to challenge the inappropriateness of the proposed individualized education plan, to advance the costs of private school education, and to take the risk that their decision will not be upheld.

This Court should not permit states and local educational agencies which fail to fulfill their obligations under IDEA to preclude parents from obtaining for their children an education consistent with the Act, "simply because," as the Court of Appeals stated, "that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." Pet. App. 18a.

ARGUMENT

I. The Relief Authorized by the Decision Below is Consistent with 20 U.S.C. § 1415(e)(2) and this Court's

Decision in *Burlington*

A. The Standard for Reviewing a Parent's Unilateral Educational Placement was Previously Decided by this Court in *Burlington*

This Court recognized in *Burlington* that the language of 20 U.S.C. § 1415(e)(2) to "grant such relief [for violations of the Act] as the court determines is appropriate" confers "broad discretion on the court." 471 U.S. at 369. In *Burlington*, the parents of a child with disabilities withdrew him from the public school program and placed him at their expense in a state approved private school that provided specialized instruction and related services for children with learning disabilities under 20 U.S.C. § 1413(b). In a short and unanimous decision, this Court construed § 1415(e)(2) as including the authority to order a local education agency to reimburse parents for their expenditures for private school education if the public school's proposed individual education program [IEP] is inappropriate and the private school placement, is found "proper under the Act."

The principal purposes of IDEA are "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of children with disabilities and their parents or guardians are protected." 20 U.S.C. § 1400(c).[11] Participating states and local school districts which develop a plan for identifying and providing all eligible children with disabilities a free appropriate public education consistent with procedural safeguards receive federal financial assistance under

[11] The legislative history of the IDEA (originally referred to as the Education of All Handicapped Children Act) is set out in *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 187-203 (1982).

the Act to assist them in meeting these goals. Among the procedural safeguards provided parents with respect to the provision of a free appropriate public education for their children, 20 U.S.C. § 1400(a), is the right to participate in the development of an "individualized education program", or IEP, and to challenge any proposed IEP with which they disagree in administrative and judicial proceedings. 20 U.S.C. §§ 1401(a)(20), 1415(b), (d), (e).

The IEP has been described as the *modus operandi*, *Burlington*, 471 U.S. at 368, or "centerpiece," *Honig v. Doe*, 484 U.S. 305, 311 (1987), of the Act. This written document is a comprehensive statement of the educational needs of the child with disabilities and the specially designed instruction and related services to be employed to meet those needs. 20 U.S.C. § 1401(a)(20). The IEP is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and the student, when appropriate. 20 U.S.C. § 1401(a)(20). As acknowledged in *Burlington*, because "this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any disputes the school officials would have a natural advantage", 471 U.S. at 368, the Act incorporates an elaborate set of procedural safeguards "to insure the full participation of the parents and proper resolution of substantive disagreements." *Id.* The Act provides for parents to have access to "all relevant records with respect to the identification, evaluation, and educational placement of the child;" provides for parents to obtain "an independent education evaluation of the child;" and entitles the parents to "an impartial due process hearing," to resolve their complaints. *Id.* In addition, the Act provides for judicial review in state or federal court to "[a]ny party aggrieved by the findings and decision" of the due process hearing(s). *Id.* Section 1415(e)(2) explicitly provides that the reviewing court "shall receive the records of the administrative proceedings, shall

hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

Under the Act, it is expected that during the pendency of any administrative or judicial proceedings, unless the State or local educational agency and the parents or guardian otherwise agree, "the child shall remain in the then current educational placement of such child." 20 U.S.C. § 1415(e)(3). In *Burlington*, where the parents were challenging the appropriateness of their son's "then current educational placement," 471 U.S. at 371, and had unilaterally placed their son in a private school, the local educational agency argued that potential relief available under section 1415(e)(2) did not include reimbursement to parents for private school tuition and related expenses. Moreover, even if such remedy were available, the local educational agency (LEA) argued, section 1415(e)(3) barred parents from any such reimbursement who rejected a proposed IEP and placed their child in a private school without the consent of the LEA. *See Burlington*, 471 U.S. at 371.

Rejecting the LEA's' waiver argument which left parents an all or nothing option -- leave the child in an inappropriate placement or waive any claim to reimbursement -- this court correctly held in *Burlington* that section 1415(e)(2) "confers broad discretion on the court 'to grant such relief [it] determines is 'appropriate.'" 471 U.S. at 369. "Absent other reference," the Court reasoned that "the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act." *Id.* Given the Act's primary purpose to provide children with disabilities "a free appropriate public education which emphasizes special education and related services to meet their unique needs," the Court noted that though "such education will be provided where possible in regular public schools," the Act contemplates "placement in private schools at public expense

where this is not possible." *Id.*, citing 20 U.S.C. § 1412(5); 34 C.F.R. §§ 300.132, 300.227, 300.307(b), 300.347. In a situation where a court determines that a private placement selected by the parents was "proper under the Act" and that an IEP calling for placement in a public school was "inappropriate," the Court found that 'appropriate' relief (under § 1415(e)(2)) would include "a prospective injunction directing the school officials to develop and implement at public expense an IEP placing a child in a private school." *Id.* at 370.

Because the "review process is ponderous," the Court understood that parents who disagree with the proposed IEP are confronted with a choice: "go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Burlington*. Therefore, the Court reasoned that only an interpretation of § 1415(e)(2) empowering courts to grant such "appropriate" relief as retroactive reimbursement to parents in a proper case could fulfill the purposes of the Act. Otherwise, the Court stated, "the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete." *Id.* (emphasis added).

B. The Fourth Circuit Correctly Interpreted *Burlington* and *Rowley* in Determining that the Private Placement Selected by Respondents Was "Proper under the Act"

In affirming the district court's finding that Respondents' child's placement at Trident Academy was "proper under the Act", the appellate court drew upon this Court's holding in *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982) that the substantive education provided Respondent's daughter by Trident Academy was "reasonably

calculated to enable the child to receive educational benefits." Pet. App. at 17a. Noting that this is the same standard by which the appropriateness of a public school's proposed IEP is assessed, the appellate court correctly held that a private placement is "proper under the Act" for purposes of reimbursement if it meets this standard, providing education consistent to meet the IDEA's educational goals. Pet. App. 17a, citing *Tice ex rel. Tice v. Botetourt County School Board*, 908 F.2d 1200, 1208 (4th Cir. 1990) (standard is whether private placement "was proper to meet the Act's educational goals"). The rule adopted by the Fourth Circuit is thus faithful to *Burlington's* holding that "appropriate relief" in IDEA disputes means relief that is appropriate in light of the purposes of the act. *See* 471 U.S. at 369.

Congress' goal in enacting IDEA was to end years of educational neglect and to ensure that all children with disabilities are provided equal protection under the laws. In *Rowley*, 458 U.S. 176 (1982), the first case in which this Court considered the Education for All Handicapped Children Act, the predecessor of IDEA, it was noted that the Act was passed in response to the failure of the states to provide adequate education for students with disabilities. 458 U.S. at 179-181. The Court emphasized the importance of providing a child with disabilities personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. 458 U.S. at 188-89.

As the lower courts recognized, the education provided Shannon at Trident was more than consistent with these purposes. The district court expressly determined that Trident Academy provided respondent's daughter "an excellent education in substantial compliance with all the substantive requirements of the [IDEA]." Pet. App. 37a. Consistent with IDEA's emphasis on educational planning, goal setting, and accountability, Trident

set and revised students goals four times per school year."[12] *Id.* at 11a. Trident "evaluated Shannon quarterly, not yearly as mandated in the [IDEA], it provided Shannon with low teacher-student ratios, and it developed a plan which allowed Shannon to receive passing marks and progress from grade to grade." *Id.*[13] In reaching its determination the trial court relied upon substantial undisputed testimony by respondents' witnesses, C.A.J.A. 190, 193-93; 228-29; 238-39; 343-45; 350-51; 388, as well as on the court's own appointed expert, C.A.J.A. 326, 328, 330, 341. On appeal, petitioner did not even contest the district court's conclusion that Trident Academy provided Shannon with an appropriate education. Pet. App. 10a n.2. Specifically, the Court of Appeals found in this case that a private placement that, like Trident, meets these criteria may be "proper under the Act" and reimbursable under *Burlington* even if it has not been approved by the state for the child's placement under the Act. Pet. App. 17a. Although the term "approved" may have different meanings in different states and in different fact situations, in the context of this case the concept of being "approved" by the state is synonymous with the determination that the private school at issue "meets State education standards" under 20 U.S.C. § 1401(a)(18)(B).[14] As the Court of Appeals for the Fourth

---

[12] Significantly, the regulations implementing IDEA only require review of students' educational goals annually. 34 C.F.R. § 300.343(d).

[13] In contrast, the district court determined that even if all of the goals set in the inappropriate IEP developed by Petitioner had been met, Shannon would have continued to fall behind her classmates at an alarming rate, and have been precluded from receiving passing grades and progressing from grade to grade. Pet. App. 36a.

[14] At least two aspects of the Fourth Circuit's opinion make this clear. First, the Court "respectfully decline[d] to follow *Tucker v. Bay Shore Union Free School District*, 873 F.2d 563 (2d Cir. 1989), Pet. App. 16a, which the Fourth Circuit described as having held that "a private school placement cannot be 'proper under the Act," even if made by parents rather than public school

Circuit noted, this issue was not present in *Burlington*, for the Massachusetts Department of Education had "approved" the private school where the parents had unilaterally placed their son.

While holding that a private placement may be "proper under the Act" for purposes of *Burlington* without meeting state standards, the Fourth Circuit nonetheless safeguarded the legitimate role state education agency standards have in ensuring educational quality. The court recognized that "when parents unilaterally place their child in a private school that has not been approved by the state, they invariably bear some risk that the school will fail to provide an adequate education." Pet. App. 19a. To the extent that the education is inadequate, the placement will not have been "proper under the Act," and reimbursement will be barred under *Burlington*. *Id.* Petitioners have not claimed, here or below, that any lack of compliance with state standards by Trident Academy rendered Shannon's education inappropriate.[15]

---

officials, when the private school in question does not 'meet the standards of the State educational agency.'" Pet. App. 16a, citing *Tucker*, 873 F.2d at 568. Second, the Court viewed as pertinent to its analysis 20 U.S.C. § 1413(a)(4)(B)(ii), which imposes the requirement that private placements made by public agencies discharging their IDEA obligations "meet standards that apply to State and local education agencies"

[15] Few federal courts of appeal have considered whether a unilateral placement must be made into a state-approved school or otherwise meet state educational standards in order to qualify for *Burlington* reimbursement. Of those courts that have considered the issue, it appears that only the Second Circuit, and then only under the New York scheme, has conditioned *Burlington* reimbursement upon prior state approval of the private school in question. *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563 (2d Cir. 1989); *Antkowiak v. Ambach*, 838 F.2d 635 (2d Cir.), *cert. denied sub nom. Doe v. Sobol*, 488 U.S. 850 (1988).

The Fifth Circuit, in *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986), permitted reimbursement for services the parent obtained for the child, even though that

C. The Decision Below Wisely Declines to Abrogate the *Burlington* Remedy in South Carolina and Other States That Fail to Provide A Mechanism By Which Parents Can Ascertain Whether A School Meets State Standards

In reasoning that in *Burlington* this Court did not intend to impose on private schools chosen by parents the whole panoply of duties the Act imposes on the state in order for such a placement to be "proper under the Act," Pet. App. 16a, the Fourth Circuit recognized that such a requirement would be unrealistic and unfair, particularly in circumstances such as these, where the private placement is the result of a complete default by the local educational agency of its statutory

---

program "might not have been adequate under the EAHCA," because "[t]he *Burlington* rule is not so narrow as to permit reimbursement only when the interim placement is found to be the exact proper placement required under the Act." *Id.* The Fifth Circuit remanded the case for a determination of reimbursement due under the circumstances. The Fifth Circuit's analysis and disposition were consistent with *Burlington's* holding that "equitable considerations are relevant in fashioning relief." 471 U.S. at 374. Other courts permitting reimbursement in analogous circumstances include *W.G. v. Board of Trustees of Target Range School District No. 23*, 960 F.2d 1479 (9th Cir. 1992) (reimbursement for a tutor for implementing an IEP improperly refused by the school district) (citing *Alamo Heights*); *Garland Independent School District v. Wilks*, 657 F. Supp. 1163, 1166-67 (N.D. Tex. 1987) (low income parent was entitled to reimbursement for furnishing those services intended, to the extent the parent could afford, to create a "facsimile" of the residential placement ultimately ordered by the court); *Shirk v. District of Columbia*, 756 F. Supp. 31 (D.D.C. 1991) (school was not approved part of the time the student attended); *Carrington v. Commissioner of Educ.*, 535 N.E.2d 212, 216 (Mass. 1989) (allowing repayment for unilateral placement for school not on state approved list); *Thornock v. Boise Independent School District No. 1*, 767 P.2d 1241 (Idaho 1988), *cert. denied* 490 U.S. 1068 (1989) (allowing repayment for parochial school expenses when IEP not appropriate); *but see, Fagan v. District of Columbia*, No. 90-0371, 1993 WL 96965 (D.D.C. Mar. 25, 1993).

obligations. Furthermore, in view of South Carolina's regulatory scheme, any other result would have been tantamount to an abrogation of the *Burlington* remedy.

In South Carolina, if a child with disabilities is placed in a private school by the State education agency or local school district, the private school must comply with the Defined Minimum Program for South Carolina School Districts ("DMP") promulgated by the State Board of Education. S.C. Code Regs. 43-243(E)(7). The table of contents is seven pages long; the DMP itself more than 130 pages.

Unlike New York, Maryland, North Carolina and other states, see Brief Amicus Curiae of the States at 16-18, the South Carolina Department of Education has created no mechanism by which parents may determine whether a particular private school meets these voluminous standards. South Carolina does not maintain a list of schools that complies with the DMP and so are approved for the provision of special education, nor does it provide a mechanism by which a private school can apply for general approval to serve as a special education placement. Rather, the South Carolina Department of Education approves private schools for special education placements only in reference to the proposed placement of a particular child and, most importantly, *only when the proposed placement is initiated by the state or a local educational agency. See* S.C. Code Regs. 43-243(E). Not only are South Carolina parents unable to consult a list of schools that meet state standards, no process exists by which they may apply to the state for such a determination.

It is unrealistic in the extreme to suggest, as Petitioner does, *see* Pet'r Br. at 11, 25, that the same school district which is currently denying appropriate services and facing legal action as a result will assist parents in determining the suitability of a private school (payment for which the district may ultimately be

held liable by a court) under governing state standards, much less initiate the state approval process. It is also contrary to the state regulation, which allows for state approval only when the local educational agency itself seeks to place the child in a private school. *See* S.C. Code Regs. 43-243(E). Furthermore, approval will be granted only "[w]hen it is clearly not feasible to accord educational opportunity to handicapped children in a public school program." *Id.* Petitioner and other similarly situated local educational agencies would not be likely to make such an assertion.

This case amply demonstrates how requiring prior state approval of private school placements allows states to circumvent the *Burlington* remedy by refusing to approve the private school.[16] If Petitioner's contention is adopted, South Carolina--whose failure to fulfill its IDEA obligation, 20 U.S.C. §§ 1412-1414, to ensure the provision of an appropriate education by the school district triggered respondent's recourse to private placement--will have succeeded in eliminating *Burlington* as a viable remedy within its borders by the simple expedient of approving private schools as consistent with state standards only on a case-by-case basis at the behest of the offending school district, regardless of the actual educational needs of the child.

The Fourth Circuit wisely precluded this result, correctly reasoning that "[w]hen . . . schools fail to meet their responsibilities . . . parents may be left to their own devices in finding a school that provides the specialized educational environment necessary to educate their children. In such circumstances, it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides

---

[16] *See also Straube v. Florida Union Free Sch. Dist.*, 778 F. Supp. 774, 780 (S.D.N.Y. 1991) (criticizing the Second Circuit's requirement of placement at a state-approved school in *Tucker* and *Antkowiak*).

appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." Pet. App. 18a.

D. The Fourth Circuit Appropriately Concluded that 20 U.S.C. § 1413(a)(4)(B) Does Not Limit the Court's Remedial Authority to Grant Tuition Reimbursement.

Section 1413(a)(4)(B) is not a limitation on the authority of the court to award tuition reimbursement to parents who, when public school districts default in their obligation to provide free appropriate public education to their child, unilaterally place the child in a private school that is not "approved" by the State and not required to meet State educational standards. As the Fourth Circuit properly recognized, section 1413 imposes no requirement that a private school be approved by the state in parent-placement reimbursement cases. The legislative history contains no indication to the contrary, *see, e.g.*, S. Rep. No. 168, 94th Cong. 1st Sess. 32, 50, *reprinted in* 1975 U.S.C.C.A.N. 1425, 1456, 1473, Pet. App. 13a, and federal regulations and South Carolina law similarly apply state educational standards to private schools only when students are placed there by the state or school district. *See* 34 C.F.R. §§ 300.400-300.403; 300.347; S.C. Code § 59-33-50; S.C. Code Regs. 43-243(E)(7).

Section 1413(a)(4)(B) of the Act was intended to protect children with disabilities who are placed by the State or local educational agency. The court below discussed section 1413 and the legislative history of the Act only to emphasize that "Congress clearly envisioned that section 1413(a)(4)(B), and its requirement that private schools receiving funds under the Act meet state educational standards, would apply only when the child is placed in the private school by the state or local school system." Pet. App. 13a. The court simply held that section 1413

does not limit the authority of courts to award reimbursement where parents, responding to an LEA's default on its obligation to provide a free appropriate public education, make the appropriate placement.[17]

Congress recognized the need for states and local education agencies to use a variety of placement alternatives, including private schools, in order to appropriately educate all children with disabilities. Section 1413 was designed to ensure that children placed in private schools received the full protections, rights and opportunities intended for all children with disabilities. States and LEAs must abide by its provisions when using a private school as part of the continuum of alternative placements IDEA requires them to have available.[18]

E. The Relief Awarded Below Was Appropriate as Equitable Restitution

The courts below also had the authority, as part of their power to grant broad equitable relief, to award reimbursement as restitution, a traditional equitable remedy long recognized by this Court. For example, *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), considered whether restitution was a remedy available for violations of the Emergency Price Control Act.

---

[17] Statutory language should be given its plain meaning. "When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'" *Garcia v. United States*, 469 U.S. 70, 75 (1984) (citing *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978)). The language of 20 U.S.C. § 1413 (a)(4)(B) applies exclusively to placements by state and local educational authorities. Whether the section is read in isolation or as part of the entire IDEA, it makes sense only if limited to those entities legally responsible for providing a free and appropriate public education.

[18] *See* 34 C.F.R. § 300.551(a) (requiring public agencies to insure that a continuum of alternative placements is available).

Even though the statute did not specifically grant the Price Administrator the power to seek restitution on behalf of overcharged tenants, this Court permitted the action:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of jurisdiction. *And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.* Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515, 552 (1937).
>
> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary or inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Id. at 398 (emphasis added). *See also Hall v. Cole*, 412 U.S. 1, 12 (1973); *Hecht Co. v. Bowles*, 321 U.S. 321 (1944); *Metropolitan R.R. v. District of Columbia*, 132 U.S. 1 (1889); John W. Wade, *Restitution for Benefits Conferred Without Request*, 19 Vand. L. Rev. 1183, 1185, 1195-98 and nn.58-80 (1966).[19]

---

[19] The Restatement of Restitution states, "A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct." Restatement of Restitution § 76 (1936).

Recent decisions of the Courts of Appeals have recognized the continuing vitality of this principle. For example, the Fifth Circuit held that the liability to the United States imposed on polluters by the Federal Water Pollution Control Act was quasi-contractual. *United States v. P/B STCO 213, ON 527 979*, 756 F.2d 364, 370-374 and nn.8-15 (5th Cir. 1985).

> Courts consistently have recognized these principles and have imposed on defendants a quasi-contractual obligation to reimburse a plaintiff, who has performed a duty, at his own expense, where the defendant was primarily obligated to discharge the duty. *This is especially true where the performance of the duty was necessary to preserve the public's welfare and safety.*

United States v. P/B STCO 213, ON 527 979, 756 F.2d at 371 (emphasis added); *see also Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 543 (2d Cir. 1983), *rev'd on other grounds*, 470 U.S. 226 (1985) [20]

The Carters discharged the school district's duty to provide special education and related services by enabling their daughter to obtain a high school diploma. The Carters provided

---

[20] See also Restatement of Restitution § 113 (1936), which states, "A person who has performed the noncontractual duty of another by supplying a third party with necessaries which in violation of such duty the other had failed to supply, although acting without the other's knowledge or consent, is entitled to restitution therefor from the other if he acted unofficiously and with intent to charge therefor." The Carters supplied Shannon with the education she required, acting in their capacities as parents and in the exercise of their right to reimbursement.

the necessary education for their daughter: the school district did not. Awarding the Carters restitution both vindicates the purposes of the IDEA and provides school districts with an incentive for compliance; refusing restitution rewards school districts for the same behavior that led to the enactment of the IDEA.

II. The Terms of 20 U.S.C. § 1401(a)(18) Cannot Logically Be Applied to A Placement Made By a Parent In the Face of School District Opposition

Despite Petitioner's contention that parental placements must meet the definition of "free appropriate public education" set forth in 20 U.S.C. § 1401(a)(18) in order to qualify for reimbursement under *Burlington*, analysis of the statutory definition demonstrates that this is an improper and impossible burden. Two of the four criteria set forth in section 1401(a)(18) by their very terms cannot be met by, and are inapplicable to, parents who, forced by an LEA's default of its responsibility to provide a "free appropriate public education" to their child, must resort to self-help--using their own resources to locate and place the child in a program able to meet her individual needs.

The IDEA provides that, "[t]he term 'free appropriate public education' means special education and related services" that--(A) have been provided at public expense, under public supervision and direction, without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." 20 U.S.C. § 1418(a)(18). Petitioner does not dispute the fact that Trident Academy provided Respondent with "special education and related services," as required by the first sentence of § 1401(a)(18), or that the

education provided by Trident Academy included "an appropriate . . . secondary school education in the State involved," i.e. South Carolina, as required by section 1401(a)(18)(C).[21]

While making much of Trident Academy's purported failure to meet the criteria of section 1401(a)(18)(B) and (D), Petitioner fails to recognize that § 1401(a)(18)(A) cannot logically be applied to placements made by parents pursuant to *Burlington* in response to a school system's violation of IDEA. In a case such as this one, where the private placement will necessarily have been made not only without the school system's cooperation, but over its objection and subject to litigation, the education received there will not be "under public supervision and direction," or "without charge," as required by section 1401(a)(18)(A).[22]

Similarly, the requirements of section 1401(a)(18)(D) do not apply, and logically cannot be made to apply, to placements made by parents in the face of public school system default. Section 1401(a)(18)(D) calls for provision of services "in conformity with the individualized education program required under section 1414(a)(5)." Section 1414(a)(5), in turn, requires a local educational agency such as Petitioner "which desires to receive payments under [IDEA] . . . to provide assurances that the local educational agency . . . will establish or revise . . . an individualized education program for each child with a disability

---

[21] The district court found, and Petitioner did not dispute on appeal, that "'Trident Academy provided Shannon an excellent education in substantial compliance with all the substantive requirements of the [Act].'" Pet. App. at 6a and 10a n.2. Shannon graduated from Trident with a high school diploma recognized by the State of South Carolina. *See supra* n.7.

[22] Nowhere in the record below, for example, is there any indication that Petitioner sought to supervise or direct or otherwise assist in seeing that Respondent was properly educated during her time at Trident Academy.

. . . at the beginning of each school year." 20 U.S.C. § 1415(a)(5). The § 1414(a)(5) mandate to develop an IEP, and the § 1401(a)(18)(D) mandate to provide special education and related services in conformity therewith, thus run solely to local education agencies.[23]

Furthermore, an IEP by definition is a document prepared by public school personnel. The term "individualized education program" as used in 20 U.S.C. § 1401(a)(18)(D) "means a written statement for each child with a disability developed in any meeting *by a representative of the local educational agency* . . . who shall be qualified to provide, or supervise the provision of instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child." 20 U.S.C. § 1401(a)(20) (emphasis added). In Shannon's case, the "individualized education program" contemplated by §§ 1401(a)(18)(D) and 1401(a)(20) was the very IEP found by the district court to be inappropriate. Adoption of Petitioner's argument would condition Respondent's obtaining reimbursement on Trident Academy's having followed the inadequate IEP developed by Petitioner. It is unlikely that Petitioner, or any other school system embroiled in litigation with parents over the appropriateness of the IEP developed by that system, would concede that it had acted inappropriately in the past by developing a new IEP for implementation at a private school. Petitioner does not suggest that it showed any willingness to participate in the development of an IEP for use at Trident at any point during the three years Respondent spent there, with

[23] Significantly, even when a local education agency, rather than a parent, places a child with disabilities in a private school, the local education agency remains responsible for developing the child's IEP and ensuring that it is implemented. *See* 34 C.F.R. § 300.347.

Petitioner's full knowledge.[24]

Petitioner argues that the statutory definition of "free appropriate public education" limits the remedial powers of courts, yet arbitrarily omits from its analysis those components of the definition, discussed above, that by their very terms derail its argument. Petitioner offers no principled basis--indeed, no basis at all--for picking and choosing among the various components of § 1401(a)(18) to which courts and parents must adhere. Its contention that a parental placement must meet the statutory definition of "free appropriate public education" in order to be deemed "proper under the Act" for purposes of *Burlington* must therefore be rejected. Indeed, *Burlington* implicitly recognized and avoided the trap into which Petitioner now urges the Court to fall by using the phrase "proper under the Act," rather than "appropriate under the Act," to describe the permissible remedies under the IDEA.

III. 20 U.S.C. § 1415 and the Decisions of This Court Preclude the Curtailment of Judicial Remedial Authority Urged By Petitioner

A. Courts Acting Under § 1415(e)(2) Have Broad Authority to Grant Appropriate Relief Based Upon the Nature and Scope of the Violation Committed

At the root of Petitioner's contention that it cannot be required to reimburse parents for anything short of an education that meets the statutory definition of "free appropriate public

[24] Development of a new "IEP" by Trident personnel would not have satisfied § 1401(a)(18)(D), as it would not have been developed with the participation of Petitioner, as required by § 1401(a)(20), and so would not have been an "IEP" within the meaning of either provision.

education" is the flawed and dangerous assertion that reimbursement under the principles enunciated in *Burlington* is simply "an alternative manner of fulfilling" its statutory obligation to provide a free appropriate public education, see Pet. 19, to which the statutory definition ought therefore apply. Thus in Petitioner's view, a local education agency is at liberty to select one of two equally acceptable options for meeting the obligations imposed by IDEA: it can provide a free appropriate public education at the outset or, in the alternative, it can decline to do so, wait to be sued, litigate, and then, upon losing, reimburse those parents for the cost of procuring alternative educational services.

These are not equally acceptable options, however, and an LEA that chooses the latter violates IDEA. That a court may ultimately award monetary relief for the violation in no way alters the fact that rights were violated and legal obligations breached. Reimbursement under such circumstances is an equitable remedy for a violation, not an "alternative manner of fulfilling" an already-breached obligation.

Once reimbursement is properly understood as relief for an LEA's violation of a federal statute, rather than as an option for complying with that statute, Petitioner's proffered rationale for prohibiting the remedy approved by the Fourth Circuit collapses. Because reimbursement is a *remedy* for Petitioner's default upon its obligation to provide a free appropriate public education, it is irrelevant that "[t]he IDEA contains no condition . . . requiring states to fund *Burlington*-type placements apart from the explicit statutory obligation to provide a FAPE," Pet'r Br. 14, n.8, or that Petitioner "looks in vain through the provisions of the IDEA for language justifying compulsory public funding of such an education." Pet'r Br. 15. Petitioner points to no legal principle requiring that particular forms of relief for violation of a federal statute be spelled out therein before courts

may order them.[25]

On the contrary, the "general rule . . . is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028, 1035 (1992). *Franklin* applied this principle to hold that damages are available as a remedy for violation of Title IX of the Education Amendments of 1972--a statute that not only lacks the explicit mandate to courts to "grant such relief as the court determines is appropriate," 20 U.S.C. § 1415(e)(2), but provides no express private right of action. As *Franklin* found to be the case with Title IX, IDEA contains no "clear direction to the contrary by Congress." *Franklin*, 112 S.Ct. at 1035. Indeed, although Congress chose to delineate the *obligations* of states and LEAs

---

[25] Petitioner's reliance upon *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), in support of this contention, see Pet'r Br. 14, n.8, is misplaced. *Pennhurst* did not deal with the question of *remedies* available for a state's violation of an enforceable federal right, but rather the question of whether § 6010 of the Developmental Disabilities Assistance Act created enforceable rights. After ruling first that the legislation had been enacted pursuant to Congress' spending powers and not pursuant to its power to enforce the Fourteenth Amendment, 451 U.S. at 18, the Court held that no enforceable rights had been created because, *inter alia*, "Congress fell well short of providing clear notice to the States that they, by accepting funds under the Act, would indeed be obligated to comply with § 6010," 451 U.S. at 25, as is required when Congress legislates pursuant to the spending clause. *See id.* at 17. *Pennhurst* is thus inapposite to the issue of what remedies are appropriate when an enforceable right has been created and violated.

There is no question that IDEA creates enforceable rights. *Honig*, 484 U.S. at 309-10. Furthermore, Congress enacted IDEA pursuant to its Fourteenth Amendment enforcement powers as well as pursuant to the spending clause. *Smith v. Robinson*, 468 U.S. 992, 1010 (1984). In any event, § 1415(e)(2) has been part of IDEA from the outset, placing States and LEAs on notice that the decision to accept funds under IDEA would subject them to orders for "appropriate relief" should they violate its provisions.

with specificity and detail,[26] it declined to do the same in regard to *remedies* for breaches of those obligations, leaving to courts the task of fashioning "such relief as the court determines is appropriate." *See* 20 U.S.C. § 1415(e)(2). As this Court noted in *Burlington*, "[t]he ordinary meaning of these words confers broad discretion on the court." 471 U.S. at 369.[27] This interpretation furthers "[t]he well-settled principle that the nature and scope of the remedy are to be determined by the violation." *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977).

Burlington itself authorized as a remedy a kind of "compulsory public funding," Pet'r Br. 15, not expressly contemplated by the text of IDEA, i.e., reimbursement for a private program of special education and related services neither designed through the IEP process pursuant to 20 U.S.C. §§ 1401(a)(18)(D), (a)(20), nor provided under public supervision pursuant to 20 U.S.C. § 1401(a)(18)(A). Under these circumstances, Petitioner's reliance upon *Burlington* to buttress its contention that the equitable powers of courts under 20 U.S.C. § 1415(e)(2) are limited by the statutory definition of free appropriate public education is particularly inapt. In this connection, Petitioner cites this Court's statement in *Burlington* that "[r]eimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Burlington*,

---

[26] *See, e.g., Rowley*, at 459 U.S. at 183 ("the Act ... imposes significant requirements to be followed."; see generally 20 U.S.C. §§ 1412-1416.

[27] *Franklin* found Congress' 1986 abrogation of Eleventh Amendment immunity for violations of Title IX to be indicative of Congressional intent *not* to limit remedies available under that statute. *Franklin*, 112 S.Ct. at 1036. Acting in the wake of this Court's decision in *Dellmuth v. Muth*, 491 U.S. 223 (1989), Congress in 1990 abrogated Eleventh Amendment immunity for violations of IDEA in 1990, evincing a like intent. *See* 20 U.S.C. § 1403.

471 U.S. at 370-71.[28] In context, however, the Court was simply distinguishing equitable reimbursement from damages, having stated in the preceding sentence, "[i]n this Court, the Town repeatedly characterizes reimbursement as "damages," but that simply is not the case." *Id.* The Court was not setting a limiting principle on the remedy it was recognizing.

Furthermore, taken to its logical conclusion, Petitioner's interpretation of the Court's explanation means that regardless of a school system's default on its obligations under IDEA, a parent cannot obtain reimbursement for the alternative educational program she arranges unless the program replicates what the school system should have provided. This result, correctly rejected by the court below[29] as well as by the Fifth Circuit,[30] is untenable for many reasons. First, parents lack the expertise to precisely determine what would constitute a free appropriate public education. It is unrealistic to believe that in an adversarial situation where an LEA faces financial liability for the parent's choice, school officials would assist parents to obtain private placement.[31] Second, parents who lack the resources to pay, even temporarily, for a private school placement would be foreclosed from supplementing the inadequate public program to

---

[28] *See* Pet'r Br. at 13 and n.6.

[29] *See* Pet'r App. at 16a ("we do not believe that the Supreme Court, by requiring that the private school placement be 'proper under the Act,' intended to impose on private schools chosen by parents the whole panoply of duties that the Act imposes on the state").

[30] *See Alamo Heights*, 790 F.2d 1153, 1161 (5th Cir. 1986) ("[t]he *Burlington* rule is not so narrow as to permit reimbursement only when the interim placement chosen by the parent is found to be the exact proper placement required under the Act").

[31] As this Court noted in *Burlington*, "in any disputes the school officials would have a natural advantage." 471 U.S. at 368.

the extent that their means allow[32]. Third, in many cases, a public program other than the one actually proposed by the school system may have constituted free appropriate public education, had the LEA chosen or not refused to provide it; parents, of course, cannot make such a placement, regardless of their desire to have their child remain in their local public school system.[33] Fourth, the options available to a parent forced to resort to private placement by the public school system's default on its obligations under IDEA are limited by finances, geography and the number of private school programs providing services to students with disabilities.[34]

B. Limiting Remedial Authority to an Order Requiring A Local Education Agency to Provide a Free Appropriate Public Education as Defined by § 1401(a)(18) Would Eviscerate Judicial Enforcement of IDEA and Negate the Right of Parents Under § 1415(b) to Obtain Relief in

---

[32] *See Garland Indep. Sch. Dist. v. Wilks*, 657 F. Supp. 1163, 1166-67 (N.D. Tex. 1987) (finding that low-income parent was entitled to reimbursement for furnishing those services intended, to the extent the parent could afford, to create a "facsimile" of the residential placement ultimately ordered by the court).

[33] *See, e.g., Greer v. Rome City School District*, 950 F.2d 688 (11th Cir. 1991), opinion withdrawn, 956 F.2d 1025 (1992), reinstated 967 F.2d 470 (1992)(parents seeking placement in public regular education classroom with appropriate aids and supports); *Oberti v. Board of Educ. of Clementon*, 801 F. Supp. 1392 (D.N.J. 1992), *aff'd*, No. 92-5462, 1993 WL 178480 (3d Cir. May 28, 1993).

[34] This is particularly true in rural areas like Florence County, and in primarily rural states like South Carolina. At no point in the proceedings below, for example, did Petitioner offer the parents the name of a single private school that would have met the statutory definition of free appropriate public education or have met Respondent's educational needs.

"Any Matter" Concerning the Education of Children with Disabilities

IDEA directs courts finding violations of its provisions to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). Petitioner recognizes that for purposes of this provision, "appropriate" relief is relief that is "'appropriate' in light of the purpose of the Act . . . [which] is primarily to provide handicapped children with a 'free appropriate public education which emphasizes special education and related services designed to meet their unique needs.'" *Burlington*, 471 U.S. at 369.[35] From this precept, however, Petitioner incorrectly concludes that the only relief that is "appropriate" within the meaning of § 1415(e)(2) is relief that orders an offending school system to provide an "appropriate" education, as defined by § 1401(a)(18). *See* Pet'r Br. at 17 and n.11. Put another way, Petitioner would bar courts from doing anything other than ordering state and local education agencies to comply with their existent--and, if relief is being fashioned under § 1415(e)(2), already breached--obligation to provide free appropriate public education to all eligible children with disabilities. *See* Pet'r Br. at 17 and n.11.[36]

---

[35] *See* Pet'r Br. at 17.

[36] Petitioner's reasoning in reaching this conclusion is unclear. Petitioner apparently contends that the word "appropriate," however it may be used in the statute, e.g., "such relief as is 'appropriate,'" 20 U.S.C. § 1415(e)(2), must be given the four-pronged meaning of "free appropriate public education" found in 20 U.S.C. § 1401(a)(18). *See* Pet'r Br. at 17 and n.11. This same portion of Petitioner's brief may also be construed as contending that because (1) "appropriate" relief must further IDEA's goal of providing a "free appropriate public education," (2) the statutory statement of purpose states that one of the goals of the Act is "to assure that all children with disabilities have available to them . . . a free appropriate public education . . . ," 20 U.S.C. § 1400(c), and (3) section 1401(a)(18) defines the term "free appropriate public education," regardless of the circumstances relief is only "appropriate" if it orders a LEA

Such drastically curtailed judicial power is inconsistent with *Honig v. Doe*, 484 U.S. 305 (1988), which expressly held that the breadth of the equitable powers of federal courts acting under § 1415(e)(2) is separate and distinct from any limitations IDEA may impose on states and local education agencies. *Honig*, 484 U.S. at 327. Thus although 20 U.S.C. § 1415(e)(3) precludes a state or LEA from changing a child's educational placement without parental consent during the pendency of administrative or judicial proceedings under IDEA, § 1415(e)(2) authorizes a federal court, in exercise of its traditional equitable powers, to issue an injunction doing so in a proper case. *Honig*, 484 U.S. at 327.

Finally, Petitioner's extremely limited reading of section 1415(e)(2) is completely inconsistent with Congress' intention that IDEA function as a deterrent to the pervasive mistreatment of children with disabilities that prompted passage of the Act.[37] It would eviscerate the enforcement power of the courts, and effectively negate the right of parents under 20 U.S.C. § 1415(b) to bring complaints and, ultimately, seek judicial relief "with respect to *any matter* relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C.

---

to provide or pay for an education that meets the technical requirements of 20 U.S.C. § 1401(a)(18). As discussed *infra*, regardless of the route it has taken to arrive there, Petitioner's conclusion is incorrect.

[37] The Act's legislative history is replete with references to exclusion from school, denial of access to appropriate programs and services, *e.g.*, "There are over 8 million handicapped children in the United States and only 3.9 million are currently receiving an appropriate education; 1.75 million . . . are receiving no education at all; and 2.5 million are receiving an inappropriate education." 121 Cong. Rec. H23702 (1975) (statement of Rep. Brademas).

§ 1415(b)(1)(E) (emphasis added).[38]

IV. The Threats to Public Education and State Educational Authority Envisioned By Petitioner Are Illusory

Petitioner raises the specter of a public policy debacle if the decision of the Fourth Circuit is allowed to stand: parents will manipulate the IEP process in order to circumvent the public school system, Pet'r Br. 24, 26, courts will inappropriately interfere in state and local educational policy, Pet'r Br. 23-24, and school systems' "ability to function equitably, or perhaps at all," Pet'r Br. 26, will be jeopardized. *Burlington*, and *Rowley*, provide ample protection against these exaggerated possibilities.

At the outset, it should be noted that petitioner's implicit characterization of children with disabilities as a drain on the public fisc, against which other children must be protected, divisively pits one group of children for whom it is responsible against another, which is more than a little ironic in light of the history of IDEA.[39] Left to their own devices prior to its

---

[38] Consistent with 20 U.S.C. §§ 1415(b) and 1415(e)(2), courts have resolved complaints regarding a variety of IDEA violations, the remedy for which would entail action other than an order requiring a State or LEA to provide or pay for a particular placement constituting free appropriate public education. *See, e.g., Hacienda La Puente Unified Sch. Dist. v. Honig*, 976 F.2d 482 (9th Cir. 1992) (reinstatement of expelled student); *Muth v. Central Bucks School Dist.*, 839 F.2d 113 (3rd Cir. 1988), *rev'd on other grounds sub nom. Dellmuth v. Muth*, 491 U.S. 223 (1989) (violations of timeframes and procedures for due process hearings and decisions); *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479 (9th Cir. 1992)(reimbursement for tutoring); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984) (providing clean intermittent catheterization as a related service.)

[39] Further, cost is not the determinative factor in deciding what constitutes an appropriate education. Even if an extremely expensive placement is necessary for the child to receive some educational benefit, the district still must

enactment, local education agencies such as petitioner and states such as South Carolina simply ignored children with disabilities, largely depriving them of public education.[40] As this Court recognized in *Rowley*, 458 U.S. at 179-81, Congress passed the Act in response to this history of unconstitutional neglect.[41] As

---

pay for the placement. "[C]ost can be a legitimate consideration when devising an appropriate program for individual students. Nevertheless, cost considerations are only relevant when choosing between several options, all of which offer an 'appropriate' education. When only one is appropriate, then there is no choice." *Clevenger v. Oak Ridge Sch. Bd.*, 744 F.2d 514, 516 (6th Cir. 1984).

[40] Children with learning disabilities were the least likely to have their needs met. S. Rep. No. 168, 94th Cong., 1st Sess. 8, *reprinted in* 1975 U.S.C.C.A.N. 1432 (Bureau of Education for the Handicapped, U.S. Office of Education, estimated only 12% of children with learning disabilities were then being served).

The testimony of state Sen. James Waddell of South Carolina regarding his inability to obtain services for his son with learning disabilities presents the same failure to identify and provide services the children with disabilities as the present case, which occurred over a decade later. *Education of the Handicapped Amendments, Hearings on S. 896, S. 6, S. 34, S. 808 Before the Subcomm. on Handicapped of the Senate Comm. on Labor and Public Welfare*, 93rd Cong. 1st Sess. 183 (1973) (statement of James Waddell, state senator from South Carolina).

Children with learning disabilities continue to have difficulties in completing high school, particularly in South Carolina. Only 30.93% of students with specific learning disabilities aged 14 and older who exited the South Carolina educational system during the 1989-90 school year graduated with a diploma. Another 28.16% dropped out, 29.34% received a certificate of attendance, and the balance left for other reasons. Nationally, 51.85% of these students graduated with a diploma, 26.77% dropped out, 10.02% received a certificate of attendance, and the balance left for other reasons. United States Department of Education, *Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* A-156 (1992).

[41] Two leading cases, *Pennsylvania Ass'n of Retarded Children (PARC) v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (1972), and *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), provided much of the impetus for Congressional action. *See Rowley*, 458 U.S.

petitioner's response to Shannon demonstrates, the educational neglect of children with disabilities continues.

Allowing courts to award reimbursement under the circumstances of this case provides no more of an incentive for parents to inappropriately utilize IDEA to secure private education than does this Court's decision in *Burlington*, which itself imposes substantial barriers to such parents. The fact that parents must first incur the expense of private education is in itself a significant disincentive to private placement, as is the fact that they "do so at their own financial risk." *Burlington*, 471 U.S. at 374. The Fourth Circuit recognized that this risk serves as a critical brake to the speculative abuses cited by petitioner, warning that "parents who unilaterally place their child in an unapproved private school bear substantial risks--risks that function to ensure that our decision will not be a means through which parents can subvert the Act's emphasis on public education." Pet. App. 18a.

In addition, in order to defeat an action for reimbursement, a school district need only establish that its IEP was "appropriate" under what petitioner characterizes as "the lax standard of review for an IEP"[42] established by *Rowley*, *i.e.*, that

---

at 192; *Honig*, 484 U.S. at 324-25; *Smith v. Robinson*, 468 U.S. 992, (1984). "[C]ongress perceived the EHA as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education." *Id.* at 1008] A study conducted in 1973 listed 33 cases involving the education of children with disabilities. *Education of the Handicapped Amendments, Hearings on H.R. 4199 Before the Select Subcomm. of the House Comm. on Education and Labor*, 93rd Cong., 1st Sess. 75-76 (1973); by 1975, 46 court cases had been filed. 121 Cong. Rec. H23703 (1975) (remarks of Rep. Brademas). *See also* Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 Harv. L. Rev. 1103 (1979).

[42] Pet'r Br. 16.

it was "reasonably calculated to provide educational benefits." *Rowley*, 458 U.S. at 207. The administrative and judicial proceedings provided for by 20 U.S.C. § 1415 provide ample opportunity for school systems to present the evidence required to prove the substantive appropriateness of its IEP.[43] In the event that a proposed IEP is deemed inappropriate, parents must still demonstrate that the private placement they chose was "proper under the Act." *Burlington*, 471 U.S. at 370.[44]

Even then, *Burlington* provides that "equitable considerations are relevant in fashioning relief," *Burlington*, 471 U.S. at 374, affording courts the flexibility to take the circumstances of the particular case into account in determining whether to order reimbursement. Although the specific equitable factors, if any, to be considered will vary from case to case, their potential scope is more than sufficient to protect local educational agencies from parents with nefarious motives, as well as from liability for unnecessarily costly placements. *See, e.g., Alamo Heights*, 790 F.2d at 1161; *Town of Burlington v. Dept. of Educ. for the Commonwealth of Massachusetts*, 736 F.2d 773, 801 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985).

Given these safeguards, petitioner's assertions are as much an attack on *Burlington* as they are an appeal of the decision below. Indeed, without saying as much and in the name of "the federalism balance so carefully struck in the Act," Pet'r Br. 24, petitioner would enlist this Court in the creation of a

---

[43] The numerous cases denying parents reimbursement demonstrate that school systems have been quite successful in doing so. *See, e.g., Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48 (1st Cir. 1992); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1122 (1991); *Livingston v. DeSoto County Sch. Dist.*, 782 F. Supp. 1173 (N.D. Miss 1992).

[44] Here, too, section 1415 provides ample opportunity for school districts to present evidence that this was not the case.

scheme under which it and other South Carolina school districts would be immune from awards of reimbursement, despite *Burlington*. With no list of approved schools and no alternative mechanism for ascertaining whether a school meets state standards, South Carolina parents can always be barred from *Burlington* reimbursement if petitioner's view is adopted. Such a result is utterly inconsistent with the purposes of the Act.

Petitioner appears to object generally to being held accountable when it violates the rights of students with disabilities. Petitioner's contention that "[t]he issue here . . . involves proper recognition of state authority," Pet'r Br. 23, and its objection to federal courts determining the propriety of "*Burlington*-type parental placements," Pet'r Br. 23, can best be understood in these terms. Absent from these arguments is any recognition that "*Burlington*-type parental placements" are made, and courts called upon to determine their propriety, only after the state, or a local education agency for whose IDEA compliance the state is ultimately responsible,[45] has violated rights and obligations under federal law. Under such circumstances, relief such as that awarded by district court and approved by the Fourth Circuit constitutes not improper usurpation by federal courts of the expertise of education authorities, but enforcement of federal law.[46]

---

[45] *See* 20 U.S.C. § 1412(6).

[46] The Fourth Circuit took pains to balance respect for state authority with the obligation to enforce federal rights. The court made a point of explaining that it intended "in no way to disparage the process through which states impose standards upon public schools and certify teachers as qualified to teach in particular subject areas," Pet. App. 19a, noting that "[s]uch state regulatory mechanisms play a positive and important role in ensuring educational quality." *Id.* Nonetheless, it could not be consistent with IDEA to condition reimbursement upon state approval "when the state has defaulted on its statutory obligations." *Id.*

Petitioners control their own destiny, financially and programmatically. The IDEA grants states and local school districts great latitude in designing the required continuum of alternative placement options and in determining the parameters of an appropriate IEP for each child they serve. Petitioners have the power to develop appropriate programs and placement alternatives that cost less than private placement. Had they done so here, respondent would not have been forced to enroll in a private program far from home.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

PETER W.D. WRIGHT
Counsel of Record
Courthouse Commons
4104 East Parham Road
Richmond, Virginia 23228
(804) 755-3000

NANCY C. McCORMICK
South Carolina Protection and Advocacy
System for the Handicapped, Inc.
3710 Landmark Drive, Suite 208
Columbia, South Carolina 29204
(803) 782-0639

June 18, 1993

No. 91-1523

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

Of Counsel

BRUCE E. DAVIS
1704 Fair Street
Camden, S.C. 29020
(803) 432-2880

DONALD B. AYER
(Counsel of Record)
BETH HEIFETZ
DAVID A. YALOF
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioners

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The Decision Of The Court Below Disables The Essential Machinery Of The Act Whenever Parents Elect To Withdraw Their Child From Public School Due To The State's Failure To Provide A Free Appropriate Public Education 2

II. Failure To Apply The Requirements Of The Act Cannot Be Justified By General Invocation Of The Broad Remedial Discretion Of The Courts 7

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases

Amoco Production Co. v. Village of Gambell, 480 U.S. 531 (1987) 7
Board of Educ. v. Rowley, 458 U.S. 176 (1982) 3, 4, 5
Burlington Sch. Comm. v. Massachusetts Dep't of Educ., 471 U.S. 359 (1985) 1, 2, 7, 11
Connor v. Finch, 431 U.S. 407 (1977) 8
Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947) 8
Heckler v. Day, 467 U.S. 104 (1984) 7
Honig v. Doe, 484 U.S. 305 (1988) 3, 9
Milliken v. Bradley, 433 U.S. 267 (1977) 8
Schweiker v. Hansen, 450 U.S. 785 (1981) 7
Smith v. Robinson, 468 U.S. 992 (1984) 9
United States v. MacCollom, 426 U.S. 317 (1976) 8
Upham v. Seamon, 456 U.S. 37 (1982)(per curiam) 8
Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) 7
Whitcomb v. Chavis, 403 U.S. 124 (1971) 7, 8

Statutes and Regulations

Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 *et seq.* (West 1990 & Supp. 1993) 2
20 U.S.C. § 1401(a)(18) 11, 13
20 U.S.C. § 1401(a)(20) 4, 5
20 U.S.C. § 1413(a)(4)(B) 6, 13
20 U.S.C. § 1414(a)(5) 4, 13
20 U.S.C. § 1415(e) 7, 8
S.C. Code Regs. 43-243(E) 11

Legislative History

S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1523

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONERS

Dwelling substantially on the facts that the public school placement provided to their daughter was found by a court to be inappropriate, and that the three years she spent at Trident Academy were viewed by various witnesses and by the courts below as beneficial to her, respondents and their *amici* seek to present this case as all but decided by *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359 (1985). They characterize the issue as requiring nothing more than a routine application of a court's remedial discretion, and thus submit that a contrary decision would unduly curtail the authority of courts to address violations of the Individuals with Disabilities Education Act ("IDEA").

In all of these respects, respondents and their *amici* ignore the essential reality that in seeking to do what it deems justice on the particular facts, the court below has enunciated a rule that will severely impair the functioning of the Act as this Court has interpreted it. By deciding categorically that unilateral parental placements pursuant to *Burlington* need not fulfill the statutory requirements for a free appropriate public education ("FAPE"), including the satisfaction of state educational standards and compliance with the IEP procedures, the court below has done two things that are directly at odds with the established objectives of the statute. For that significant class of cases, it has greatly curtailed the role of state educational authorities in setting educational standards and policy, and it has rendered inapplicable the primary mechanisms by which the statute has sought to improve the quality of education for disabled children. Because those actions are at substantial odds with the purposes of the statute as enunciated by this Court, the decision of the court below should be reversed.

I. The Decision Of The Court Below Disables The Essential Machinery Of The Act Whenever Parents Elect To Withdraw Their Child From Public School Due To The State's Failure To Provide A Free Appropriate Public Education

In our opening brief (Pet. Br. 12-21), we demonstrated that the decision of the court below goes beyond what can reasonably be required under the Act. It does this by ordering public funding of private education, even though the private education at issue fails to satisfy the requirements of a FAPE.[1] At the same time, we showed that this unauthorized imposition on state and local educational agencies undermines the effective functioning of the Act for the benefit of disabled students. Pet. Br. 22-26. As a

[1] Thus, the education ordered funded here does not serve the statute's principal purpose. *Burlington*, 471 U.S. at 369 ("purpose of the Act. . . is principally to provide handicapped children with 'a free appropriate public education. . .'").

result, any time that a parent withdraws his or her child from the public school based on dissatisfaction with a placement found inappropriate by a court, the most important provisions of the Act addressed to the achievement of educational quality for that child are rendered inapplicable. Public funding of the child's private education is no longer contingent on the satisfaction of state educational standards or the use of the IEP procedure, as required for a FAPE -- the "goal" of the statute. *Honig v. Doe*, 484 U.S. 305, 308 (1988).[2] Instead, the expenditure of state and federal money is to be ordered simply on the basis that the education selected by the parents is reasonably calculated to enable the child to receive educational benefits.

In so holding, the court below has immobilized the portions of Act that are its primary means of assuring disabled students an appropriate education.[3] Those are, first, application to disabled students of the same educational standards applicable to the non-disabled, and, second, implementation of a set of procedures -- of which the IEP is the centerpiece -- in which the school and the parents are brought together to formulate and revise a plan for addressing the needs of the disabled child. *Board of Educ. v. Rowley*, 458 U.S. 176, 207-08 (1982).

[2] The court below recognized that:

> [T]he Act imposes only two prerequisites to reimbursement: that the program proposed by the state failed to provide the child a free appropriate public education, and that the private school in which the child is enrolled succeeded in providing an appropriate education, *i.e.*, an education that is reasonably calculated to enable the child to receive educational benefits.

Pet. App. 17a.

[3] That requirement was directly responsive to the phenomenon observed by Congress that, prior to the Act's enactment, more than a million students were simply being excluded from the public schools entirely, and many more were being dealt with in a clearly inappropriate way. *Board of Educ. v. Rowley*, 458 U.S. 176, 189 (1982).

In this way, the court below has made the statute a vehicle for "displac[ing] the primacy of States in the field of education." *Rowley*, 458 U.S. at 208. Where the state has once failed to provide an appropriate placement, parents are freed to receive public funding, including money appropriated under the Act, for educational services that do not meet minimum standards set by state educational authorities. So long as a court views the private placement as beneficial to the child, it can order restitution from public funds. Contrary to *Rowley*, 458 U.S. at 206-08, state educational policy is thus supplanted by a court's assessment of educational benefit.[4]

The same is true of the IEP requirement, which is central to the achievement of the Act's educational goals, and whose procedures are spelled out in great detail in the Act. *See Rowley*, 458 U.S. at 181-82. Notwithstanding, as all agree, that a child placed by the state in a private school must be given the benefit of the IEP process, the court held the IEP requirement inapplicable where the child is placed by the parents rather than the school authorities.[5] Public funding for this private school

---

[4] Respondents mistakenly assert that "[p]etitioners have not claimed, here or below, that any lack of compliance with state standards by Trident Academy rendered Shannon's education inappropriate." Resp. Br. 20. In fact, that claim was a fundamental part of petitioner's brief. *See, e.g.*, Pet. Br. 14-15 (after noting that Trident failed to meet the standards of the state educational agency, petitioners argued that "the state's obligation under the statute is to provide a FAPE, and the placement selected by respondents is concededly not that"); Pet. Br. 17 (The goal of the Act "is not furthered by requiring public funding under the Act of an education that is not a FAPE . . . by authorizing a publicly funded special education that fails to utilize the IEP process and ignores educational standards adopted for general application throughout the State").

[5] Respondents describe the services provided by Trident in a way that suggests that it provides something close to the equivalent of the IEP process. Resp. Br. 9. They do not, however, discuss most of the essential procedural aspects of the IEP as set forth in the statute, 20

education will be allowed -- although it is not a FAPE -- so long as a court finds the placement to be of some benefit to the child. Pet. App. 17a.

This dismantling of the FAPE requirement in the cases of children placed in private schools under *Burlington* leaves in place only a provision requiring low-level judicial scrutiny of whether the education being provided is reasonably calculated to confer educational benefit. In formulating this standard for reviewing the substance of educational services being provided to disabled students -- a subject not addressed in the statute itself -- this Court was careful to note that this low level of substantive review was appropriate precisely because of the statute's heavy reliance on procedure. *Rowley*, 458 U.S. at 206. The two part inquiry announced in *Rowley* looks first to satisfaction of all required procedures,[6] and only then to the substantive question whether the IEP is "reasonably calculated to enable the child to receive educational benefits[.]" *Id.* at 206-07. Standing apart from the statute's explicit prerequisites for a FAPE, judicial review under this latter standard provides only the most limited impetus in the direction of improving the education of disabled students.

The decision of the court below thus rests on an implicit premise that parents and the private schools they select unilaterally for their children can be counted on to identify and pursue appropriate placements, without aid of the extensive procedural and other directives explicit in the requirement of a

---

U.S.C. §§ 1401(a)(20), 1414(a)(5). In any event, the court below decided the case on the basis that "Trident does not attempt to comply with the terms of the Act. Trident does not, for example, develop education plans called IEPs, though it does set goals for students and revise [sic] them four times per school year." Pet. App. 11a.

[6] This procedural inquiry requires a court to satisfy itself that the State has adopted the state plan, policies, and assurances (e.g., that state educational standards be met), and has created an IEP which conforms to the provisions of 20 U.S.C. § 1401(a)(20). *Rowley*, 458 U.S. at 206 n.27.

FAPE. However, nothing in the statute offers any basis for believing that those directives, though essential where public school authorities are concerned, were somehow intended to be inapplicable when funds under the Act go to a private educational provider.

On the contrary, the statute specifically contemplates that state standards and the IEP process are to be met where private institutions provide services under the Act. Congress explicitly recognized that state agencies would utilize such providers,[7] and required that state plans provide assurance that state standard and IEP requirements will be met in those cases. 20 U.S.C. § 1413(a)(4)(B). The statute thus directly rejects the inherently implausible notion that the Act's procedural machinery is unnecessary where the educational provider is a private entity.[8]

---

[7] Congress intended that the local agency would in effect become the "lead agency for assuring that educational services are appropriate for the handicapped child" when they are provided by public and private non-profit agencies being "utilized to meet the full services mandate." S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1446.

[8] For reasons that were fully discussed in our opening brief (Pet. Br. 18-20), the language in § 1413(a)(4)(B) focusing on state -- but not parental -- referrals to private institutions offers no basis for inferring, as respondents suggest (Resp. Br. 25 n.17), that the requirements of a FAPE should be ignored in the context of a *Burlington* placement. Omission of that mention is explained, *inter alia*, by the fact that the possibility of *Burlington* placements was not explicitly recognized anywhere else in the statute either, and it appears that the possibility of that case arising was simply not something with which the drafters dealt. A sensible reading of the statute looks to the fact of state funding, and thus the concomitant state responsibility for the education being provided, as triggering the obligation to assure compliance with the central requirements of the Act.

II. Failure To Apply The Requirements Of The Act Cannot Be Justified By General Invocation Of The Broad Remedial Discretion Of The Courts

Both Respondents and the United States bring to their aid the unquestioned propositions that courts generally have very broad discretion in shaping equitable remedies, and that this discretion has been incorporated into the IDEA by 20 U.S.C. § 1415(e)(2). Resp Br. 31-36; U.S. Br. 10-12. They also note, as they must, this Court's observation in *Burlington*, 471 U.S. at 369, that the appropriateness of relief must be measured against the purposes of the Act. Resp. Br. 37; U.S. Br. 12. Accordingly, it is clear that the existence of broad discretion does not excuse a court from the often-difficult task of formulating remedies in a manner attentive to a broad range of considerations, most notably the purposes of the statute. *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 544 (1987) (considering underlying purpose of Alaska National Interest Land Conservation Act as part of analysis leading to reversal on an injunction against sale of oil and gas leases); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982) (considering purpose of Federal Water Pollution Control Act in reversing injunction against dumping of Navy ordnance).

Thus, this Court has stated that the remedial powers of federal courts, while "adequate to the task," are "not unlimited." *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). Equitable relief granted based on an improper consideration of the relevant factors will be set aside by the Court. *See, e.g., Amoco Production Co.*, 480 U.S. at 545-46; *Heckler v. Day*, 467 U.S. 104, 119 (1984) (reversing an injunction imposing a deadline on determinations under the Social Security Disability program, as contrary to congressional action rejecting a proposal for such a deadline); *Romero-Barcelo*, 456 U.S. at 320.

Where an equitable remedy requires the payment of money by the government, that remedy is also bounded by "the duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Schweiker v. Hansen*, 450 U.S. 785, 788

(1981) (citing *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385 (1947)). "Where Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized." *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality op.).

This need for special scrutiny of remedial action is accentuated where, as here, Congress has enacted programs that incorporate state standards and rely on state implementation. In those instances, remedial measures are cabined both by congressional purpose and by fundamental federalism concerns.[9] Thus, for example, a district court's remedy that did not include valid portions of a state reapportionment plan was struck down by this Court as an unjustified disruption of state policy. *See Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam). *See also Connor v. Finch*, 431 U.S. 407, 414-15 (1977); *Whitcomb v. Chavis*, 403 U.S. at 161. In this case, the consequences of the decision below on the financial health of state educational systems and on the role of states in setting educational policy thus deserve special consideration.

This Court has explicitly addressed the issue of equitable discretion in the context of the IDEA. In *Honig v. Doe*, this Court faced the question whether the "stay-put" provision of 20 U.S.C. § 1415(e)(3) should be read to include an implicit exception allowing school authorities to remove students from their present placement for dangerous or disruptive conduct. The Court declined to read any such exception into that provision, requiring instead that it be applied in accordance with its terms. The Court thus barred any state-initiated change in the present

---

[9] In fact, courts devising equitable remedies must always be mindful of inherent federalism limitations, even in the absence of legislation. "[T]he federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977).

placement except upon agreement of the parents and the educational authorities. 484 U.S. at 325.

In response to the State's contention that such a result left it no means of addressing the problem of a dangerous student, the Court stated that the possibility of judicial relief nonetheless remained, since both the administrative exhaustion requirements of the Act and the "stay-put" provision itself were subject, upon a proper showing, to exception by judicial as distinguished from state agency action. The exhaustion requirements could be overcome by demonstrating to a court the futility or inadequacy of the procedures in issue. *Honig*, 484 U.S. at 327. *See Smith v. Robinson*, 468 U.S. 992, 1014 n.17 (1984). The "stay-put" commandment of Section 1415(e)(3) was said to create a presumption to be overridden only by showing a substantial likelihood that injury would otherwise result. 484 U.S. at 328.

Honig thus offers a clear approach to dealing with circumstances where explicit requirements of the Act appear to be in tension with its broader purposes. Just as courts will not allow the "stay-put" provision to stand in the way of relief necessary to protect schoolchildren from serious risk of injury, they should not allow FAPE's educational standards and IEP requirement to foreclose unreasonably the pursuit of educational opportunity through the unilateral parental placement process recognized in *Burlington*. But in both cases there is a burden to be overcome before the Act's explicit directives will be ignored. That should be the burden identified in *Honig* -- of showing that compliance with the statute's express language will be futile in some sense, or that exceptional circumstances render enforced compliance inappropriate, in light of the purposes of the Act.

In most if not all cases, as in *Honig*, the showing required must rest on particular circumstances justifying exceptional treatment. Thus a parent seeking reimbursement under *Burlington*, where the private school fails to meet state educational standards or provide an IEP, should be required to show reasonable efforts to ensure compliance with those provisions, including, as appropriate, inquiries of the state

educational agencies. Failure to make all reasonable efforts to achieve compliance will be excused only in the rare case where parents can demonstrate that they failed to do so because it would have been futile.[10] The issue of what precise showing should be required is not squarely presented here, since the record is devoid of any hint that respondents made any inquiry whatever about the standing of Trident, or had any reason for believing that it would have been pointless to do so.[11] Moreover, the decision of the court below is clear in its conclusion that the state standard and IEP requirements of the Act are categorically inapplicable in the *Burlington* context, without regard to any facts peculiar to this case. Pet. App. 17a, 37a.

If one accepts that the FAPE requirement on its face purports to apply to all publicly funded education under the Act, and that its realization is, as this Court has said, the principal purpose of

---

[10] They might show, for example, that no schools reasonably available to them are capable of meeting all of the state's requirements.

[11] Perhaps seeking to demonstrate, at this late date, the futility of any effort to communicate with petitioners on any of these subjects, respondents dwell at substantial length on their version of the background facts of this case, seeking to convince the Court by selective citation of the appellate court record that they have been substantially mistreated in their dealings with Petitioners. Resp. Br. 2-10.

Petitioners dispute fundamentally the severely slanted account of events which respondents have offered. The record in fact reflects a school district that endeavored to create an educational program for Shannon Carter when her needs became known. The school district responded to parental requests by providing testing, guidance counseling, and an education plan in the form of a proposed IEP. The school district worked closely with the parents to incorporate in the IEP their judgments, as well as the judgments of the counselor hired by the parents. As it turned out, that plan, arrived at cooperatively between the parents and the school authorities, was found by the district court -- after the fact -- to be inappropriate. At the same time, the district court rejected the claim of procedural non-compliance on the part of the school district. Pet. App. 35a.

the Act, *Burlington*, 471 U.S. at 369, this departure from that requirement cannot be justified as a matter of equitable discretion under *Honig*. The simple fact that parents decide to remove their child from the public school based on a disagreement with school authorities about the then-existing placement does not in itself suggest that the requirements of a FAPE cannot realistically be met.[12] Nor is it true, as respondents suggest, that the requirements of a FAPE cannot "logically be applied" where the parents and not the school district place the child in the private school. Resp. Br. 28-31.[13]

More specifically, no sound reason appears why parents desiring to make a unilateral private school placement at public expense cannot in most cases be held to the requirement of Section 1401(a)(18)(B) that the school they select "meet the standards of the State educational agency." It is little enough to ask of parents seeking public funding that they do what respondents here distinctly failed to do -- make some inquiry of school authorities as to whether the institution they have in mind meets state standards.[14] Contrary to respondents' assertion

---

[12] State cooperation with parents asserting their rights established under *Burlington* is a far cry from the issue actually presented in *Burlington*, 471 U.S. at 372, and referenced by the United States, Br. at 9, where the Court noted that school officials who disagreed with the parents' desire for a private placement were unlikely to agree to a departure from the "stay-put" provision. Unlike the officials who in that context might have declined to agree to move the child, state officials now refusing to cooperate with the parents seeking to move their child would do so in spite of the parents' clear right under *Burlington*.

[13] The requirements of 20 U.S.C. § 1401(a)(18)(A) and (C) that the education be provided "at public expense" and "without charge," and that it "include an appropriate preschool, elementary, or secondary school education in the State involved," will be fulfilled where the state pays for an education that meets the remaining criteria of a FAPE.

[14] Respondents seek to predict, based on a general reference to South Carolina regulations, S.C. Code Regs. 43-243(E), that they would have received no answer had they inquired whether Trident met state

(Resp. Br. 22-23), it is not at all unrealistic to expect that state authorities would assist parents by providing them with that information, aware as they are of the parents' right under *Burlington* to elect unilaterally to remove their child from the public school.[15] The mere possibility that some school authorities may be uncooperative hardly supports a rule of law that simply eliminates the requirement of compliance with state educational standards. Ignoring that requirement is justified only upon a showing that inquiries aimed at achieving that end will be futile or otherwise disruptive of the purposes of the Act. Requiring such a showing will hardly have the effect of "eliminating *Burlington* as a viable remedy" in South Carolina or anywhere

---

standards, since "no process exists by which they may apply to the state for such a determination." Resp. Br. 8, 22-23. The absence of any articulated regulatory procedure, however, does not foreclose a simple inquiry, by telephone or in person, which might have elicited an answer based on existing knowledge, or might have resulted in an investigation by school authorities to determine whether the relevant standards were met. In any event, none of these issues was considered below, since respondents never argued that their failure to make any inquiry was based upon its anticipated futility, and the court below concluded that, in the *Burlington* context, parents simply have no obligation to see that state standards are met. Pet. App. 17a.

[15] However a particular state addresses inquiries concerning private school compliance with state educational standards, in each instance the process must begin with a parental inquiry seeking information on the compliance of one or more private schools with state educational standards. In that sense, the distinction offered by the United States, Br. at 25, between this case and those in which "parents have ready access to information" -- as where a list is maintained -- is illusory. *See* Brief *Amicus Curiae* of The National Alliance for the Mentally Ill, The Bazelon Center for Mental Health Law, The National Association of Protection and Advocacy Systems, and the Maryland Disability Law Center in Support of Respondents, at 6 ("Even if a State maintains a list of approved schools, parents are often unaware of its existence. The school district possesses all the information about whether a private school has been State-approved.")

else. Resp. Br. 23. On the contrary, it will render more likely the possibility that the resulting publicly-funded placements will better advance the purposes of the Act by more often conforming to the existing state standards.[16]

Similarly, the Section 1401(a)(18)(D) requirement, that education and related services be "provided in conformity with that [IEP] required under § 1414(a)(5)," likewise can be satisfied where a child is in private school, even when the placement is made in response to an allegedly deficient educational plan. Resp. Br. 29. The Act itself requires that state plans assure that where the state refers the child outside the public school, those "children with disabilities in private schools and facilities . . . be provided special education and related services (in conformance with an individualized education program as required by this subchapter)." 20 U.S.C. § 1413(a)(4)(B)(i). Nothing in the record suggests that public school officials do not participate in an IEP under these circumstances, and there appears no reason why they could not participate to some extent in the case of *Burlington* placements as well. Even if that is not practical in a particular case, the private school, working with the parents, can still fulfill the remaining explicit provisions of the IEP requirement. 20 U.S.C. § 1414(a)(5).

Accordingly, there is nothing about the circumstances of a unilateral parental placement that necessarily frustrates the realization of the statute's goal of a FAPE for every disabled child. While cases may arise where the achievement of state

---

[16] Although the issue has not played a part in the litigation of this case, no reason appears as to why the fact of a *Burlington* placement necessarily, and in every case, forecloses realization of the requirement of § 1401(a)(18)(A) that the educational services be provided "under public supervision and direction." Resp. Br. 29. While there may be cases where animosity or uncooperativeness of school authorities render any supervisory role impractical or disruptive, one cannot assume that this will usually be so. In any event, one form of supervision that will generally be possible is the adherence to state standards in the education that is being provided.

standards or of the IEP requirement in a private school setting may be impractical, that is no reason to rewrite the statute to eliminate its principal goal of achieving a FAPE for every child in all *Burlington* placements. Absent a showing of reasonable effort by the parents to achieve that compliance with the statute, and of particular circumstances justifying the parents' assertion that such effort would be futile or that compliance is impractical, there is no basis for a judicial order of funding under the Act for an education that does not provide a FAPE. Because no such showing was undertaken here, and because the court below made clear that it was unnecessary, the decision below must be set aside. The broad remedial discretion of the federal courts is no talisman, somehow justifying decisions that override the core purposes of legislative enactments.

CONCLUSION

For the foregoing reasons and those set forth in Petitioners' Opening Brief, the decision of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

Of Counsel
Bruce E. Davis
1704 Fair Street
Camden, S.C. 29020
(803) 432-2880

DONALD B. AYER
(Counsel of Record)
BETH HEIFETZ
DAVID A. YALOF
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioners

July 16, 1993

(9)

No. 91-1523

Supreme Court, U.S.
FILED
JUN 18 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ET AL., PETITIONERS

v.

SHANNON CARTER, A MINOR, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY D. CARTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

DREW S. DAYS, III
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

AMY L. WAX
Assistant to the Solicitor General

WILLIAM KANTER
JOHN P. SCHNITKER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, after determining that petitioners failed to meet their statutory obligation under the Individuals with Disabilities Education Act (IDEA or Act), 20 U.S.C. 1400 *et seq.* (1988 & Supp. II 1990), to provide respondent Shannon Carter with a "free appropriate public education," the district court had authority to order petitioners to reimburse respondent for the costs of an educational program offered in a private school chosen by her parents that met her educational needs in accordance with the Act's substantive requirements but did not satisfy all of the Act's procedural or definitional criteria.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Introduction and summary of argument	8
Argument:	
A court may order a school district that has failed to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA) to reimburse parents for the costs of a disabled child's private school education that meets the child's educational needs but does not satisfy the procedural requirements for a free appropriate public education under Section 1401(a)(18) of IDEA	10
A. Nothing in IDEA prohibits courts from exercising their broad remedial authority to award tuition reimbursement for a private school education that meets a child's educational needs but does not satisfy state educational standards or utilize the statute's IEP procedure	10
B. Conditioning the award of tuition reimbursement on a private school's satisfaction of Section 1401(a)(18) criteria would effectively burden parents with procedural duties that the statute explicitly imposes on state and local agencies	12
C. Depriving parents of the opportunity to receive reimbursement for the costs of a private school education that fails to satisfy the definitional criteria of Section 1401(a)(18) would unjustifiably frustrate the statute's goal of providing disabled children with a free appropriate public education	16
Conclusion	27

TABLE OF AUTHORITIES

Cases: Page

Alamo Heights Indep. School Dist., 790 F.2d 1153 (5th Cir. 1986) 23
Bell v. *Hood*, 327 U.S. 678 (1946) 10, 14, 23
Board of Educ. v. *Rowley*, 458 U.S. 176 (1982) 7, 8, 9, 12, 21, 26
California v. *American Stores Co.*, 495 U.S. 271 (1990) 8, 11
Carrington v. *Commissioner of Educ.*, 535 N.E.2d 212 (Mass. 1989) 23
Davis v. *Passman*, 442 U.S. 228 (1979) 11
Drew P. v. *Clarke County School Dist.*, 877 F.2d 927 (11th Cir. 1989), cert. denied, 494 U.S. 1046 (1990) 25
Franklin v. *Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992) 10, 11, 14, 23
Hall v. *Cole*, 412 U.S. 1 (1973) 11
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 11
Honig v. *Doe*, 484 U.S. 305 (1988) 3
Matta v. *Board of Educ.-Indian Hill Exempted Village Schools*, 731 F. Supp. 253 (S.D. Ohio 1990) 25, 26
Pennhurst State School & Hospital v. *Halderman*, 451 U.S. 1 (1981) 14
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946) 8, 11
Roland M. v. *Concord School Committee*, 910 F.2d 983 (1st Cir. 1990), cert. denied, 111 S. Ct. 1122 (1991) 21, 23
School Committee of Burlington v. *Department of Educ.*, 471 U.S. 359 (1985) 5, 8, 9, 10, 12, 15, 16, 17, 18, 19
Town of Burlington v. *Department of Educ.*, 736 F.2d 773 (1st Cir. 1984), aff'd, 471 U.S. 359 (1985) 23

Cases—Continued: Page

Tucker v. *Bay Shore Union Free School Dist.*, 873 F.2d 563 (2d Cir. 1989) 25
Weinberger v. *Romero-Barcelo*, 456 U.S. 305 (1982) 11

Statutes and regulations:

Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* (1988 & Supp. II 1990) 1, 2
20 U.S.C. 1400(c) (Supp. II 1990) 2
20 U.S.C. 1401(a)(18) ..... *passim*
20 U.S.C. 1401(a)(18)(A) 18-19
20 U.S.C. 1401(a)(18)(D) 18, 19
20 U.S.C. 1401(a)(19) 3
20 U.S.C. 1401(a)(20) (Supp. II 1990) 2, 3, 8, 18, 20
20 U.S.C. 1402 (1988 & Supp. II 1990) 1
20 U.S.C. 1411-1415 (1988 & Supp. II 1990) 2
20 U.S.C. 1412 (1988 & Supp. II 1990) 2
20 U.S.C. 1412(1) (Supp. II 1990) 2, 5, 8, 9, 12, 14
20 U.S.C. 1412(4) (Supp. II 1990) 13
20 U.S.C. 1412(5)(B) (Supp. II 1990) 2, 27
20 U.S.C. 1412-1413 (1988 & Supp. II 1990) 1
20 U.S.C. 1413 (1988 & Supp. II 1990) 2
20 U.S.C. 1413(a)(4)(B) (1988 & Supp. II 1990) 6, 13, 18
20 U.S.C. 1414(a)(1)(C) (1988 & Supp. II 1990) 12
20 U.S.C. 1414(a)(5) (Supp. II 1990) 2, 3, 13, 18
20 U.S.C. 1415 (1988 & Supp. II 1990) 3
20 U.S.C. 1415(e)(2) 6, 8, 10, 12
20 U.S.C. 1415(e)(3) 15
20 U.S.C. 1420 2
34 C.F.R. Pt. 300 1
S.C. Code Regs. § 43-243E (1982) 18

Miscellaneous:

S. Rep. No. 168, 94th Cong., 1st Sess. (1975) 12, 13

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1523

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ET AL., PETITIONERS

v.

SHANNON CARTER, A MINOR, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY D. CARTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The Secretary of Education has been charged by Congress with administering the provisions of the Individuals with Disabilities Education Act (IDEA). See, *e.g.*, 20 U.S.C. 1402, 1412-1413 (1988 & Supp. II 1990); 34 C.F.R. Pt. 300. The United States has an interest in the remedies available to parents and disabled children under the Act in the event that a state or local educational agency defaults on its obligations under the Act. The United States filed a brief *amicus curiae* in this case at the petition stage at this Court's invitation.

STATEMENT

1. Congress enacted the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* (1988 & Supp. II 1990), to assure the availability to all children with disabilities of "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." Section 1400(c). Congress sought to "assist States and localities to provide for education of all children with disabilities," *ibid.*, by offering financial assistance to the States in exchange for the States' agreement to comply with federal statutory standards and procedures. Sections 1411-1415, 1420.

To qualify for federal financial assistance under IDEA, a State must demonstrate that it "has in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. 1412(1) (Supp. II 1990). See Section 1401(a)(18) (*reprinted at* Pet. App. 56a) (setting forth the criteria for the "free appropriate public education" that the State must provide, including the requirement that it "meet the standards of the State educational agency"). The State must formulate a plan, approved by the Secretary of Education, that describes the goals, programs, and timetables under which the State intends to educate children with disabilities within its jurisdiction. Sections 1412, 1413.[1] At the local level, IDEA requires the pertinent public education authority to prepare and review annually an "individualized education program" (IEP) for each child with disabilities. 20 U.S.C. 1401(a)(18) and (20), 1414(a)(5) (1988 & Supp. II 1990).[2] As this Court has noted, the IEP is the "centerpiece of [IDEA's] education delivery system for disabled children." *Honig* v. *Doe*, 484 U.S. 305, 311 (1988). The IEP describes the individualized instruction and services that the local educational agency (LEA) will provide to disabled children, and sets goals for educational achievement. Sections 1401(a)(18) and (20), 1414(a)(5).[3]

2. In 1982 and 1983, respondent Shannon Carter was a student in the seventh grade at the Timmonsville public school operated by petitioner Florence County School District Four.[4] Pet. App. 3a, 24a. On May 1, 1985, after Shannon was classified by the school district as learning disabled under South Carolina State Department

[1] Among other things, the State must demonstrate that, "to the maximum extent appropriate," it will educate children with disabilities "with children who are not disabled," unless "the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." Section 1412(5)(B). This has come to be known as the "mainstreaming" requirement.

[2] We note that the criteria for IEP plans that were in effect at the time respondent filed suit in 1986 were codified at Section 1401(a)(19). In 1990, that provision was amended to add additional requirements and redesignated as Section 1401(a)(20). For purposes of consistency with petitioners' brief, we cite throughout to Section 1401(a)(20).

[3] An IEP is developed jointly by school personnel, the parents of the disabled child, and, where appropriate, the child himself. The IEP ordinarily includes a statement of the child's present levels of educational performance, the annual educational goals (including short-term instructional objectives), the specific educational services to be provided, and the criteria and evaluation procedures for determining, on an annual basis, whether instructional objectives are being achieved. Section 1401(a)(20). The LEA must provide for yearly review of the IEP, and must make appropriate revisions in the plan, if necessary. Section 1414(a)(5).

In addition to establishing detailed requirements for the IEP, IDEA also grants parents or guardians of children with disabilities certain procedural rights with regard to decisions concerning the child's education, including the right to examine relevant records, the right to a hearing before the LEA and review of the agency's decision by the State, and the right to challenge the State's decision in a civil action in either state or federal court. See Section 1415.

[4] After attending Timmonsville Elementary School for the first grade, Shannon apparently attended the Roy Hudgens Academy, a private school, for grades two through six. Pet. App. 3a, 23a.

of Education (SDE) criteria, see Pet. App. 4a, 25a, school personnel held a meeting with Shannon's parents to formulate an IEP for Shannon. The school district proposed that Shannon remain in regular classes but spend at least two hours daily in the "resource room." Shannon's parents objected to this plan because it would require Shannon to attend classes with severely disturbed children. Instead, her parents proposed an "itinerant" program under which Shannon would remain in regular classes but receive individualized instruction for three periods per week. An IEP was prepared based on this program, was signed by the school district and Shannon's parents, and became effective on May 2, 1985. The IEP established goals in reading and mathematics of four months' progress for the entire school year. *Id.* at 4a-5a, 26a-27a.

Dissatisfied with the IEP, Shannon's parents requested a hearing to challenge the school district's educational program.[5] Pet. App. 5a, 28a. On August 20, 1985, a local educational hearing officer concluded that petitioners were providing an adequate academic program for Shannon. *Id.* at 44a-54a. That conclusion was upheld on review by the South Carolina SDE. *Id.* at 40a-43a. In the meantime, Shannon's parents placed her at the Trident Academy in Mt. Pleasant, South Carolina, a private academy specializing in the education of children with disabilities. Shannon began courses at Trident in September 1985 and graduated from that institution in the spring of 1988. *Id.* at 5a, 28a. Shannon's parents did not seek approval for Shannon's placement at Trident from either local education officials or the South Carolina SDE. *Id.* at 5a.

3. In July 1986, Shannon's parents filed this suit on her behalf, claiming that petitioners breached their duty

[5] The district court commented that, although Shannon's parents signed the IEP, they clearly "were not satisfied with the plan." Pet. App. 27a n.8. It found that, since an IEP "is not a binding contract," and can be challenged by the parents at any time, the fact that the parents signed the document was irrelevant to the dispute concerning the adequacy of the IEP. *Ibid.*

under IDEA to provide Shannon with a "free appropriate public education." Pet. App. 6a. See Section 1412(1); Section 1401(a)(18). The complaint also sought reimbursement for tuition and other costs incurred at Trident under this Court's decision in *School Committee of Burlington* v. *Department of Educ.*, 471 U.S. 359 (1985) (*Burlington*). After a three-day bench trial, the district court ruled that the school district had violated IDEA. Pet. App. 20a-39a. The court determined that the school district's proposed program and the achievement goals set by the IEP "were wholly inadequate," and failed to satisfy the minimum requirements of the Act. *Id.* at 27a, 36a.

The district court also found that, "[a]lthough [Trident Academy] did not comply with all of the procedures outlined in [IDEA]," [6] the school provided Shannon an excellent education in substantial compliance with all the substantive requirements" of the statute. Pet. App. 37a.[7]

[6] The court did not elaborate on the "procedures" with which Trident failed to comply. However, the court elsewhere noted that the school had "not been approved" by the South Carolina SDE as an appropriate placement for children with disabilities, Pet. App. 37a, and that it would not likely be eligible for approval because it failed to meet the state requirement that it employ only certified teachers. *Id.* at 28a n.10. See also *id.* at 11a-12a (court of appeals' observation that Trident "does not, for example, develop education[al] plans called IEPs," and that it employs "at least two faculty members" who are not "certified by the state"); *id.* at 62a-71a (South Carolina regulations setting forth educational requirements for certification of teachers of children with disabilities). See Pet. Br. 13-14.

[7] The court stated that Trident "evaluated Shannon quarterly, not yearly as mandated in the [Act], it provided Shannon with low teacher-student ratios, and it developed a plan which allowed Shannon to receive passing marks and progress from grade to grade." Pet. App. 37a. The court also noted the findings of its own expert, Dr. Richard Nagle, who tested Shannon and found that she had "made significant progress at Trident." *Id.* at 29a, 37a. The court observed that "Shannon entered Trident Academy in the fall

The court awarded respondents $35,716.11 in reimbursement for costs incurred in connection with Shannon's education at Trident, together with prejudgment interest. *Id.* at 21a, 29a-32a, 39a.

4. The court of appeals affirmed. Pet. App. 1a-19a. Observing that the IEP's goal of "four months' progress over a period of more than one year was rather modest" and "failed to satisfy the Act's requirement of more than minimal or trivial progress," the court of appeals upheld the district court's determination that the school district had failed to provide Shannon with a free appropriate public education under the Act. *Id.* at 7a-8a.

The court also upheld the district court's order of reimbursement, rejecting petitioners' argument that reimbursement is authorized under the statute "only when parents place their child in a private school approved by the state." Pet. App. 12a. The court noted that, although Trident's "educational program in many ways parallels" the Act's requirements, Trident "does not attempt to comply with the terms of [IDEA]." [8] *Id.* at 11a. It held, however, that this was not "fatal to the request for reimbursement." *Id.* at 12a. The court observed that the Act's remedial provision—which authorizes the court to "grant such relief as [it] determines is appropriate," 20 U.S.C. 1415(e)(2)—is a "broad grant of equitable power designed to provide courts maximum flexibility in effectuating the statutory objectives." Pet. App. 18a; *id.* at 10a. It explained further that the requirement in Section 1413(a)(4)(B) "that private schools receiving funds under the Act meet state educational standards" applies "only when the child is placed in the private school by the state or local school system." Pet. App. 13a.

---

term of 1985 as a functional illiterate." *Id.* at 25a. Dr. Nagle found that, during Shannon's time at Trident, "[h]er reading comprehension had risen from a level of 4.7 in 1985 to 7.8 in 1988." *Id.* at 29a.

[8] See note 6, *supra*.

The court noted that petitioners did not dispute the district court's conclusion that "Trident Academy provided Shannon with an appropriate education, which is a prerequisite to reimbursement under *Burlington*." Pet. App. 10a n.2. Relying on *Board of Educ.* v. *Rowley*, 458 U.S. 176, 207 (1982), the court of appeals held that, "when a public school system has defaulted on its obligations under the Act," reimbursement is available for a private school education that is "reasonably calculated to enable the child to receive educational benefits." Pet. App. 16a-17a. The court rejected the view that the Act "forbids reimbursement when parents place their child in a private school that has not been approved by the state," *id.* at 17a, observing that "[t]he Act itself simply imposes no requirement that the private school be approved by the state in parent-placement reimbursement cases." *Id.* at 13a. The court further explained that "it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." *Id.* at 18a.[9]

5. On February 22, 1993, this Court granted the petition for certiorari, limited to the first question presented, which concerns the remedies available under IDEA when a school district defaults on its statutory obligation to provide a free appropriate public education. J.A. 26.

---

[9] The court noted that "parents who unilaterally place their child in an unapproved private school bear substantial risks," including the risk that the IEP offered by the public school will be found adequate or that the private school chosen by the parents will fail to provide an appropriate education—*i.e.*, one "reasonably calculated to enable the child to receive educational benefits." Pet. App. 17a, 18a-19a (quoting *Rowley*, 458 U.S. at 207). In either case, the panel noted, "the parents cannot receive reimbursement, whether or not the private school in question is state approved." Pet. App. 18a-19a.

INTRODUCTION AND SUMMARY OF ARGUMENT

In light of the Court's limited grant of certiorari, we take two aspects of this case as settled. First, as both courts below found, petitioners defaulted on their statutory responsibility under IDEA to provide Shannon Carter with a "free appropriate public education" (FAPE). Pet. App. 8a, 35a-36a. Second, as the courts also found, Shannon's educational program at Trident Academy was "appropriate" under the Act, in that it was reasonably calculated to provide Shannon with the level of educational benefits mandated by the Act. See *Rowley*, 458 U.S. at 206-207; Pet. App. 10a n.2, 29a, 37a. Thus, the narrow question for decision is whether the Act permits courts to order reimbursement for the costs of an "appropriate" private school program that fails to satisfy all the definitional criteria of a FAPE. See Sections 1401 (a)(18), 1412(1) (*reprinted at* Pet. App. 56a-58a).

In this case, the private school at which Shannon was educated admittedly did not meet all conditions imposed by Section 1401(a)(18). Trident did not comply with the state requirement that it employ only teachers certified to teach the disabled. See Pet. App. 71a-72a. It also did not formulate an IEP for Shannon. See Section 1401(a)(20). Nevertheless, the court below did not exceed its remedial authority by ordering tuition reimbursement for Shannon's education at Trident.

Under Section 1415(e)(2) of IDEA, which authorizes courts to "grant such relief as the court determines is appropriate," courts have broad discretion to remedy violations of IDEA. See *Burlington*, 471 U.S. at 369, 374. Courts may exercise that discretion by awarding any remedy that advances the statutory purpose, see *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 400 (1946), unless the statute, "in so many words," makes that relief unavailable. *California* v. *American Stores Co.*, 495 U.S. 271, 295 (1990).

Nothing in IDEA states that courts may award tuition reimbursement for costs incurred only at a private school

that meets state standards and utilizes the statute's IEP procedures. Section 1401(a)(18), which defines a "free appropriate public education," does not curtail the courts' discretion to order the relief that was awarded in this case. That provision lists conditions on the receipt of federal funds by state and local agencies, see Section 1412(1), not conditions on eligibility for reimbursement in the event that agencies fail to comply with the statute.

Conditioning the award of tuition reimbursement on the satisfaction of Section 1401(a)(18)'s requirements would be unjustified for the further reason that it would effectively burden parents with procedural duties that the statute explicitly imposes on state and local agencies. To ensure that their child's private school meets state standards and utilizes the statute's IEP procedures, parents would ordinarily need the assistance of the same public school authorities who have proposed the educational plan that the parents reject. Because, as this Court acknowledged in *Burlington*, 471 U.S. at 372, that assistance is unlikely to be forthcoming, requiring parents to demonstrate compliance with Section 1401(a)(18)'s requirements would in practice prevent many disabled children from vindicating their statutory right to a free appropriate public education.

Nor would any important statutory purpose be served by adopting petitioners' proposed restriction on the court's authority to award relief. The core objective of IDEA is to ensure that each disabled child receives an education that is "reasonably calculated to enable [him] to receive educational benefits." See *Rowley*, 458 U.S. at 206-207. Although Congress expected that the Act's procedural mandates (including the development of an IEP, and the incorporation of state educational standards) would foster that goal, compliance with statutory procedures is neither a necessary nor a sufficient means to that end. Thus, it is fully consistent with IDEA's underlying policies for a court, in fashioning relief, to look beyond the Act's

formal requirements, and to focus, instead, on whether the private school chosen by the parents met the child's educational needs.

In this case, the court found that Shannon's program at Trident satisfied the Act's substantive requirements, and that petitioners' proposed plan for Shannon's education did not. In these circumstances, the award of tuition reimbursement is necessary "to make good the wrong done." *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. 1028, 1033 (1992) (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)). If the award is barred, respondent will have received an empty victory, a result contrary to the congressional intent that this Court has recognized.

ARGUMENT

A COURT MAY ORDER A SCHOOL DISTRICT THAT HAS FAILED TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) TO REIMBURSE PARENTS FOR THE COSTS OF A DISABLED CHILD'S PRIVATE SCHOOL EDUCATION THAT MEETS THE CHILD'S EDUCATIONAL NEEDS BUT DOES NOT SATISFY THE PROCEDURAL REQUIREMENTS FOR A FREE APPROPRIATE PUBLIC EDUCATION UNDER SECTION 1401(a)(18) OF IDEA.

A. Nothing In IDEA Prohibits Courts From Exercising Their Broad Remedial Authority To Award Tuition Reimbursement For A Private School Education That Meets A Child's Educational Needs But Does Not Satisfy State Educational Standards Or Utilize The Statute's IEP Procedure

In IDEA, Congress authorized the federal courts to "grant such relief [for violations of the Act] as the court determines is appropriate," 20 U.S.C. 1415(e)(2). As this Court recognized in *Burlington*, 471 U.S. at 369, 374, this provision "confers broad discretion on the court" to evaluate "equitable considerations * * * in fashioning relief."

The relief available under this broad grant of authority must be examined in light of "equity practice with * * * several hundred years of history." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). This Court has repeatedly stated that courts may exercise their equitable authority by awarding any established remedy that is calculated to advance the statutory purpose and is appropriate to the circumstances. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 400 (1946); *Hall* v. *Cole*, 412 U.S. 1, 12-13 (1973); *California* v. *American Stores Co.*, 495 U.S. 271, 294 (1990). "The essence of equity jurisdiction" is "[f]lexibility rather than rigidity" and the power "to mould each decree to the necessities of the particular case." *Hecht Co.*, 321 U.S. at 329.

Moreover, limitations on a court's traditional powers in equity "should [not] be lightly implied." *Hecht Co.*, 321 U.S. at 330. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *American Stores Co.*, 495 U.S. at 295; see also *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Porter*, 328 U.S. at 398, 403; *Hecht Co.*, 321 U.S. at 330 (where Congress seeks to make "an abrupt departure from traditional equity practice," it "ma[kes] its desire plain"). Thus, any relief "compatible with sound and established equitable principles" may be awarded absent "definitive and absolute" evidence that Congress has "set[] [its] face against [it]." *Hall* v. *Cole*, 412 U.S. at 12; cf. *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. at 1032, 1034-1035 (availability of all appropriate remedies presumed "unless Congress has expressly indicated otherwise") (citing *Davis* v. *Passman*, 442 U.S. 228, 246-247 (1979)).

No provision of IDEA states that relief in the form of tuition reimbursement may be awarded only for the costs of an educational program that meets state standards or that uses the statute's IEP procedures. The provision authorizing the award of relief to persons aggrieved by

violations of the statute states only that such relief shall be granted "as the court determines is appropriate." Section 1415(e)(2). As the Court observed in *Burlington*, 471 U.S. at 369, "[t]he type of relief is not further specified, except that it must be 'appropriate' * * * in light of the purpose of the Act." And IDEA's structure and history show that its purpose is to provide disabled children with basic educational rights and benefits. See S. Rep. No. 168, 94th Cong., 1st Sess. 3 (1975) (Act's purpose was to "assure that full educational opportunities" would be made available to disabled children); *Rowley*, 458 U.S. at 200 (IDEA designed to provide disabled students with a "basic floor of opportunity"). As explained more fully below, categorically forbidding the award of reimbursement for costs incurred at a private school chosen by parents that fails to meet all criteria for a "free appropriate public education" would undermine, rather than advance, the statute's goals.

B. Conditioning The Award Of Tuition Reimbursement On A Private School's Satisfaction Of Section 1401(a)(18) Criteria Would Effectively Burden Parents With Procedural Duties That The Statute Explicitly Imposes On State And Local Agencies

1. To further the statute's objective of providing basic educational services, IDEA incorporates procedures "by which State and local educational agencies may be held accountable for providing educational services for all handicapped children." S. Rep. No. 168, *supra*, at 3. States must demonstrate, as a condition of receiving federal funds, that they have in effect a policy that guarantees disabled children an education that meets the criteria for a "free appropriate public education" in Section 1401(a)(18). See Section 1412(1). Local agencies wishing to receive funds must in turn formulate a plan for furnishing services to all eligible students, see Section 1414(a)(1)(C), and must "provide assurances" that they will comply with the statutory requirements for

formulating and reviewing IEPs, see Section 1414(a)(5); see also Section 1412(4) (State must provide assurances that the local educational agency or unit will establish and periodically review and revise IEP that meets statutory requirements). In addition, Section 1413(a)(4)(B) of the Act states that, when a State chooses to place a disabled child in a private facility "as the means of carrying out the requirements" of the statute, the State must determine whether the facility meets "standards that apply to State and local educational agencies."

Thus, the Act as a whole makes clear that state and local agencies—rather than the disabled child and his parents—are responsible for insuring that eligible children receive appropriate benefits. See S. Rep. No. 168, *supra*, at 4 ("[T]he Committee bill rests final responsibility upon the State Educational Agency for assuring that all handicapped children within the State receive a free appropriate public education."). Accordingly, it is on state and local educational agencies that the statute expressly places the burden of complying with procedural requirements respecting the provision of a free appropriate public education—including the obligations in Section 1401(a)(18) to utilize the IEP procedure and to satisfy state educational standards. The statute imposes no parallel obligation on parents who elect to enroll their children in a private school pending the outcome of a challenge to the State's educational plan. However, the result of forbidding courts to award reimbursement for unilateral private school placements that do not comply with the terms of Section 1401(a)(18) would be "to impose on private schools chosen by parents the whole panoply of duties that the Act imposes on the state." Pet. App. 16a. Because the statute does not require parents to ensure that their child's education is provided in compliance with the specific standards in Section 1401(a)(18), they should not be barred from obtaining relief that would otherwise vindicate statutory rights solely because of failure to comply with those criteria.

2. Petitioners nevertheless contend that the limitations they urge are necessary to avoid a statutory violation, because requiring them to provide reimbursement for the costs of an education that does not meet the statutory criteria for a FAPE has the effect of altering (and expanding on) their obligations under the statute. That argument, however, rests on the erroneous premise that, in remedying a statutory violation, a court sitting in equity may order a defendant to do only what the statute commands in the first instance. The relief fashioned by a court with broad remedial powers need not precisely match the terms of the statute that has been violated. On the contrary, as long as the statute does not expressly forbid it, a court may order any remedy that is necessary "to make good the wrong done," *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. at 1033 (quoting *Bell* v. *Hood*, 327 U.S. at 684).[10]

Section 1401(a)(18) does not bar the remedy that was ordered in this case. That provision lists conditions on the receipt of federal funds by state and local agencies, see Section 1412(1), not conditions on eligibility for reimbursement to parents of their resulting costs in the event those agencies fail to comply with the statute. Thus, the provision's requirements do not serve to limit the circumstances under which victims of the agencies' default may be compensated. Cf. *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. at 1032 (scope of

[10] Thus, although IDEA does not obligate States directly to provide an education that fails to "meet state standards," States that participate in IDEA nevertheless are on notice that, if they default on their statutory obligations, the statute authorizes the award of any equitable remedy that would advance the statute's purpose—including reimbursement for a program that does not meet state standards. Therefore, there is no force to the claim, see Brief Amicus Curiae, National League of Cities, et al. [hereinafter NLC], at 23-25, that the court of appeals' remedy amounts to the "imposition of a new, unexpressed condition of federal funding" in contravention of the rule in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981).

remedies available for a statutory violation is analytically distinct from the question of the parties' primary obligations under a statute).

In *Burlington*, *supra*, this Court recognized that parents and school authorities bear different obligations under the statute, and that IDEA's requirements should not be construed to limit the availability of relief in a manner that would do violence to the parties' respective roles within the statutory scheme. In defining the permissible scope of equitable relief for a local school district's violation of IDEA, the Court rejected a town's argument that parents were barred from receiving tuition reimbursement because, in moving their child to a private school without consulting school officials, they had violated the terms of 20 U.S.C. 1415(e)(3). That provision states that, during the pendency of proceedings under the statute, a child "shall remain in the then current educational placement of such child" unless the "State or local educational agency and the parents or guardian otherwise agree." See 471 U.S. at 365. Although acknowledging that the literal terms of Section 1415(e)(3) were "violated" when the parents unilaterally moved their child, the Court nevertheless refused to rule that the violation barred the parents from receiving remedial compensation for the costs of the alternative placement. In so concluding, the Court observed that Section 1415(e)(3) "says nothing about financial responsibillty, waiver, or parental right to reimbursement." 471 U.S. at 372. Moreover, although Section 1415(e)(3) literally barred transfer of the child without the school district's "agreement," the Court construed that provision in light of its purpose, which "was to prevent school officials from removing a child from the regular public school classroom over the parents' objection." 471 U.S. at 373. The Court further observed that the provision was in a Section "detailing procedural safeguards which are largely for the benefit of the parents and the child." *Ibid.* Because Section 1415(e)(3) was primarily designed to protect children and parents

from the unilateral action of school authorities, the Court concluded that it should not be read to impose an inflexible limit on the circumstances under which courts could remedy school authorities' violations of statutory rights.

Similarly, in this case, the provision on which petitioners rely, Section 1401(a)(18), says nothing about "financial responsibility, waiver, or parental right to reimbursement," nor does it make securing services that meet the specified criteria a condition for receiving relief. Moreover, the procedural safeguards in Section 1401(a)(18), like those in the statutory provision at issue in *Burlington*, "are largely for the benefit of the parents and the child." See *Burlington*, 471 U.S. at 373; see also *id.* at 368. By effectively requiring parents to secure compliance with a range of obligations that the statute imposes on States, the categorical rule proposed by petitioner would convert statutory requirements designed to safeguard the rights of parents and disabled children into obstacles to the vindication of those rights.

C. Depriving Parents Of The Opportunity To Receive Reimbursement For The Costs Of A Private School Education That Fails To Satisfy The Definitional Criteria Of Section 1401(a)(18) Would Unjustifiably Frustrate The Statute's Goal Of Providing Disabled Children With A Free Appropriate Public Education

1. Not only are petitioners' proposed conditions on relief not to be found in the statute, but they should not be adopted for other reasons: Because parents would frequently be unable to meet the conditions, violations of the Act would often go unremedied.

The relevant equitable considerations are similar to those the Court discussed in *Burlington*. Pending the outcome of their ultimately successful challenge to the school district's proposed educational program, the parents in that case withdrew their disabled child from the public school system and placed him in a private school that was generally authorized for such placements by the

State. 471 U.S. at 362-363. In rejecting the argument that the parents' failure to obtain the school district's permission to change the child's placement barred reimbursement, see pp. 15-16, *supra*, the Court explained that, if the parents' failure to obtain approval were held to bar relief, "the principal purpose of the Act will in many cases be defeated in the same way as if reimbursement were never available." 471 U.S. at 372. That is because school officials who disagree with parents concerning the adequacy of the official educational placement are unlikely to "agree to an interim private school placement while the review process runs its course." *Ibid.* If such agreement is not forthcoming, parents will be

> forced to leave the child in what may turn out to be an inappropriate placement or to obtain the appropriate placement only by sacrificing any claim for reimbursement. The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.

Ibid.

In this case, unlike *Burlington*, 471 U.S. at 362-363, the private school in which the parents placed Shannon did not meet state educational standards, nor did it otherwise satisfy the terms of Section 1401(a)(18).[11] If tuition reimbursement were categorically unavailable under these circumstances, however, Shannon's parents would be faced with essentially the same untenable choice posed in *Burlington*: that of procuring an appropriate education for their disabled child only at the cost of forgoing a free one. As respondent points out, see Br. in Opp.

[11] Although it is clear from the opinion in *Burlington* that the private school at issue in that case met state educational standards, the Court did not explicitly address the question of whether the school complied with other statutory requirements for the provision of a FAPE, such as the formulation of an IEP for each disabled student.

23-24, and petitioners do not dispute, South Carolina does not maintain a list of schools approved for the education of the disabled, and there is no official process by which private schools can obtain state approval. Nor is there any established mechanism by which parents can ascertain whether a private school meets the "standards of the State educational agency." See Br. in Opp. 22-24 (citing S.C. Code Regs. § 43-243E (1982)).[12]

In practice, then, parents would be forced to seek assistance from the very educational agency that has proposed a program that the parents have found wanting. However, as suggested in *Burlington*, educational agencies cannot ordinarily be expected to assist parents in rejecting a plan that the agency has proposed by helping parents to assess a private school's compliance with "voluminous" state and statutory requirements. See Br. in Opp. 24. It is even less likely that parents will routinely secure official help in meeting the other definitional elements of a FAPE, including the requirement that the education be provided "under public supervision and direction" and "in conformity with the individualized education program required under section 1414(a)(5)."[13] Section 1401

[12] IDEA permits States or local educational agencies to fulfill their obligations under the Act by placing disabled students in private educational institutions in lieu of public schools. See Section 1413(a)(4)(B). See p. 13, *supra*. It is only in this setting that the South Carolina regulations implementing IDEA provide for state evaluation and approval of a private school for the placement of a disabled child. See Br. in Opp. 22-23 (quoting S.C. Code Regs. § 43-243E (1982)).

[13] The Act explicitly defines an IEP as a plan developed by the local agency with the collaboration of parents and teachers, see Section 1401(a)(20), and commands the agency to "establish," "revise," and periodically "review" the IEP. See Section 1414(a)(5); Section 1401(a)(18)(D). Thus, petitioners' rule would make parents responsible for the private school's production of a detailed educational plan in cooperation with, and under the supervision of, the local educational agency, and for the agency's periodic review and revision of such a plan. See Pet. Br. 17 (arguing against

(a)(18)(A) and (D). As in *Burlington*, the parents' right to obtain a free appropriate education for their child would be held hostage to the state or local agency's willingness to cooperate with parents in identifying a suitable alternative placement and in satisfying statutory requirements for the development of an educational plan.[14] In

reimbursement for special education that "fails to utilize the IEP process"). However, as this Court recognized in *Burlington*, 471 U.S. at 372, state and local education officials who disagree with parents over the placement of a disabled child are unlikely to provide ongoing "supervision and direction" over that child's education in the private institution chosen by the parents or to participate in annual revisions of the child's IEP. These considerations corroborate our view (see pp. 12-13, *supra*) that it is the state or local educational agency, and not the parents, that must satisfy the various elements of Section 1401(a)(18).

Amicus NLC, see Br. at 9 n.6, admits that the statutory definition of an IEP contemplates that local school authorities will take part in its formulation and review. It follows that parents cannot satisfy the statute's terms unless they arrange for public school officials to collaborate with teachers from their chosen private institution in developing an IEP for their child. NLC acknowledges that, as a practical matter, "this collaboration will not be possible." *Id.* at 10 n.6. However, in an effort to avoid requiring parents to do the impossible, NLC suggests that it suffices for parents and private schools to develop an IEP on their own, without the input of public school authorities. In a strained attempt to preserve a wholly artificial limit on the court's remedial authority, amicus NLC thus arbitrarily rewrites the statute to eliminate the pivotal role of public educational authorities in the IEP process.

In any event, even if the statute could appropriately be construed to permit parents to work exclusively with private school authorities in developing an IEP, that requirement would still pose a significant obstacle to the vindication of rights under the Act. Entitlement to relief would hinge on whether private school authorities were willing, or able, to cooperate with parents in meeting the statute's elaborate requirements. The courts' authority to remedy IDEA violations should not turn on such vicissitudes, which have little to do with vindication of the Act's core objectives. See pp. 21-23, *infra*.

[14] Amicus NLC, see Br. at 18, suggests that there is no need for parents to rely on assistance from state or local educational agen-

this setting, it would defeat the remedial purposes of the Act "to impose on private schools chosen by parents the whole panoply of duties that the Act imposes on the state." Pet. App. 16a. Thus, petitioners' proposed conditions on relief would in practice prevent many disabled children from vindicating their statutory right to a free appropriate public education.

2. In the absence of an express statutory provision that makes compliance with state standards and IEP procedures a prerequisite to the award of tuition reimbursement, that limitation should not be inferred without compelling justification. The justifications proposed by petitioners fall far short of that standard.

i. Petitioners claim (Pet. Br. 24) that permitting parents to select their child's school without "the input of state officials" runs contrary to the statute's "spirit of cooperation and consultation" between parents and public school authorities. See also *id.* at 22-25. However, the statute provides school officials with an ample opportunity to consult with parents concerning each disabled child's educational program: the statute contemplates that parents will participate in the school district's formulation of an IEP in the first instance, see Section 1401(a)(20), and parental refusal to participate in that process could undermine any future claim for relief, see note 16, *infra*.

---

cies to determine whether a private school meets state educational standards, because private schools have a financial incentive to provide this information to interested parents. Although some schools might be able to furnish parents with information concerning compliance with state standards, others may be unwilling or financially unable to do so. Moreover, some schools may choose not to devote scarce resources to compliance with the full range of state standards or the development of IEPs. See note 13, *supra*. In any event, the problem in this case was not information, but availability. The district court noted that there was no evidence that "Shannon could have received the special educational services provided by Trident at any facility closer to her home or at a lower cost." Pet. App. 30a. Thus, there was no indication that the parents could have found a local institution that satisfied the requirements of Section 1401(a)(18).

If, after having engaged in such consultations, parents nevertheless opt out of the proposed program, it must be assumed that they disagree with the school district's views concerning the education of their child. Under these circumstances, calling upon parents to confer again with officials about what is best for their child would not appreciably advance the goal of cooperation between public school authorities and parents.

ii. Petitioners also complain that forcing States to use public funds for programs that "ignore state educational standards" will "undermine[] the role of the States as the primary educational authority." See Pet. Br. 22, 24; *id.* at 22-26. However, petitioners' insistence that school districts be exempted from reimbursing parents for programs that fall short of state standards loses sight of the objectives of IDEA and elevates form over substance. Implicit in this Court's discussion in *Rowley*, 458 U.S. at 200-201, is the understanding that the ultimate objective of IDEA is to provide each child with a "basic floor of [educational] opportunity." That goal is met if a child receives an education that is "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 207; *id.* at 200-201, 203; see also *Roland M.* v. *Concord School Committee*, 910 F.2d 983, 991 (1st Cir. 1990) ("Congress indubitably desired effective results and demonstrable improvement for [IDEA's] beneficiaries."), cert. denied, 111 S. Ct. 1122 (1991).

The *Rowley* Court distinguished between the substantive goal of ensuring that each disabled child receives a minimally adequate education, and "the procedures set forth in [IDEA]," which are prescribed, not for their own sake, but as a means to achieve that end. 458 U.S. at 206-207. As the Court acknowledged in *Rowley*, Congress's design for IDEA arose from a "legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." 458 U.S. at 206. However, even though

Congress expected that the mandated procedures (including the development of an IEP, and the incorporation of state standards) would foster achievement of the Act's substantive goals, compliance with statutory procedures is neither a necessary nor a sufficient means to that end. It is thus entirely proper—and fully consistent with IDEA's underlying policies—for a court, in fashioning equitable relief, to look beyond the Act's formal requirements, and to focus, instead, on whether the Act's objectives were actually achieved—that is, whether the education the child received through the parent's efforts was "reasonably calculated to enable the child to receive educational benefits." [15] If, in a particular case, the child's education meets that standard, it would not further advance the statutory purpose to demand compliance with all procedural requirements as well.

Because parents must show that the education the child received is "appropriate" under the Act, reimbursement will not be forthcoming in every case in which the State defaults under IDEA. Parents who elect to move their child to a private school of their own choosing risk bearing the costs of the education if the program the school offers is found to be inadequate. In our view, however, reimbursement should ordinarily be available to parents who can demonstrate that the placement offered by school authorities was inadequate under the Act, and that their child received an education that met the Act's substantive standards.[16] Respondent has fulfilled both of these condi-

[15] It is thus entirely proper for a court to demand that the private school program for which the parents seek reimbursement satisfies the Act's substantive standards. Permitting reimbursement for an educational program that was not reasonably calculated to benefit the child would undermine parents' incentive to select a minimally adequate program, and would defeat the Act's core purpose of providing each disabled child with a "basic floor of opportunity."

[16] This is not to say that other equitable considerations will never be relevant to the remedy fashioned by the court even where the core conditions are satisfied. "[T]he courts possess extensive powers to tailor remediation [for violations of IDEA] to meet the exigencies of specific cases." *Roland M.* v. *Concord School Committee*, 910 F.2d at 999; see also *Alamo Heights Indep. School Dist.*, 790 F.2d 1153, 1161 (5th Cir. 1986); *Town of Burlington* v. *Department of Educ.*, 736 F.2d 773, 801-802 (1st Cir. 1984), aff'd, 471 U.S. 359, 374 (1985); *Carrington* v. *Commissioner of Educ.*, 535 N.E.2d 212, 216 (Mass. 1989). In our view, a court may take into account such factors as the parties' good faith, the overall reasonableness of their conduct (including the reasonableness, in the circumstances, of the expenses incurred), and whether each fulfilled its procedural obligations under the statute. (For example, parents' failure to cooperate with the State's initial efforts to develop a satisfactory IEP would be relevant.) In this case, the equitable factors, on balance, favor relief for respondent.

tions. See Pet. App. 37a; *id.* at 17a; *id.* at 10a n.2.[17] In these circumstances, the award of tuition reimbursement is necessary "to make good the wrong done." *Franklin* v. *Gwinnett County Public Schools*, 112 S. Ct. at 1033 (quoting *Bell* v. *Hood*, 327 U.S. at 684). If that award is barred, respondent will have received an empty victory, a result contrary to the congressional intent that this Court has recognized.

3. Observing that Shannon's parents "made no inquiries of public school authorities prior to enrolling Shannon in Trident," petitioners alternatively argue (Pet. Br. 25 & n.22) that courts should not award reimbursement for the costs of a placement that falls short of statu-

[17] Amicus NLC, see Br. at 11-13, contends that, under *Burlington*, a substitute educational placement is "proper under the Act," and thus eligible for retroactive reimbursement, only if the court could have enjoined the school district to provide that placement prospectively. Although the Court in *Burlington* did observe that the private school education obtained by the parents in that case was one that the court could have ordered the school district to provide directly, the Court did not state or suggest that reimbursement would have been barred unless that condition were met. As we have discussed, it would be inconsistent with the statute's objectives—indeed it would undermine them—to impose that restriction on the courts' authority to order relief.

tory standards unless parents have at least sought public school authorities' assistance in complying with Section 1401(a)(18), and have demonstrated the authorities' bad faith "refus[al] to cooperate." In taking this position, petitioners implicitly concede that compliance with the core requirements for a FAPE is not an inflexible prerequisite to an award of private school costs; the balance of equities may favor relief even when the alternative educational placement fails to meet Section 1401(a)(18)'s requirements. See Pet. Br. 25 n.22.

Petitioners' proposal simply replaces one inflexible rule with another. Like the requirement that the private school unilaterally chosen by parents meet the criteria of Section 1401(a)(18), the requirement that parents demonstrate school authorities' "bad faith" as a condition on reimbursement is not to be found in the statute. In the absence of any textual justification for circumscribing the courts' remedial authority in this manner, traditional equitable concerns, rather than petitioners' categorical test, should govern the availability of relief.

The balance of equities does not favor petitioners' proposal, which creates new hurdles to relief without advancing any important statutory interests. By injecting into the remedial phase a host of issues concerning the sufficiency of parents' efforts, and the adequacy of the official response, petitioners' proposed rule would needlessly complicate litigation and facilitate the defeat of parents' legitimate claims.[18] Because requiring parents to demonstrate, as a condition of relief, that their child received an appropriate education fully vindicates the statute's core objec-

[18] Even if public school authorities agreed to cooperate with parents in formulating an IEP, or even if, as Amicus NLC suggests, see note 13, *supra*, public school authorities would not be required to participate at all, defendants would still have the opportunity to seek to obstruct parents' claims for reimbursement by objecting to technical lapses in compliance with the statutory procedures respecting IEPs.

tives, asking that they also demonstrate attempts to comply with statutory procedures is no more justified than demanding that they actually prove compliance.

4. This case does not present the situation in which parents have ready access to information concerning private schools that meet state educational standards or that are approved by the State for the education of the disbled. See, *e.g.*, *Tucker* v. *Bay Shore Union Free School Dist.*, 873 F.2d 563, 568 (2d Cir. 1989).[19] Nor did the parents in this case knowingly reject a private placement that met state standards in favor of one that did not. See, *e.g.*, *Matta* v. *Board of Educ.-Indian Hill Exempted Village Schools*, 731 F. Supp. 253, 258 (S.D. Ohio 1990). Although we do not believe that parents' failure to select a program known to be approved by the State in favor of an unapproved option should, in itself, bar reimbursement in the event of the State's default, there are circumstances in which the parents' refusal to defer to the State's educational judgment could come into play in fashioning relief.

For example, if the institution in which the parents placed the child provided services that were considerably more elaborate or more expensive than those available in an otherwise appropriate state-approved institution, a court might be justified in limiting the amount of the award to the cost of the state-approved alternative. Cf. also *Drew P.* v. *Clarke County School Dist.*, 877 F.2d 927, 931 (11th Cir. 1989) (court awarded only part of plaintiffs' costs for expensive residential program in Japan even though there was no "appropriate facility within the state"), cert. denied, 494 U.S. 1046 (1990). Also,

[19] Of the 27 States that have provided information to the Solicitor General concerning programs for disabled children within their jurisdictions, 16 have informed us that they maintain a publicly available list of state-approved private programs. The remaining 11 States do not compile a list, nor have they established a mechanism by which parents can readily identify private programs that meet state educational standards.

there are circumstances in which the parents' rejection of an institution that complies with state standards in favor of one that does not might be a factor in the court's assessment of whether the chosen program was educationally adequate. In this case, Shannon's dramatic and steady academic progress at Trident left little doubt that the school's program was designed to meet her educational needs. In other cases, however, the academic results achieved by the private school may be equivocal, and the "appropriateness" of a program will be difficult to assess. See, *e.g.*, *Rowley*, 458 U.S. at 192 (noting that Congress recognized that "in many instances the process of providing * * * services to handicapped children is not guaranteed to produce any particular outcome"); see also *Matta*, 731 F. Supp. at 259 (noting mixed results of disabled child's private school experience).

In the absence of clear educational progress, courts might have to consider indirect evidence of educational quality. Such evidence would include the degree to which the school adheres to sound educational practice as reflected in compliance with state standards for the education of the disabled or the requirements of IDEA. See, *e.g.*, Pet. App. 37a (noting that, although Trident did not follow IDEA to the letter, it "provided Shannon with low teacher-student ratios" and evaluated Shannon on a regular basis). Specifically, a court would be entitled to give weight to Congress's considered judgment, as embodied in Section 1401(a)(18) of IDEA, that compliance with state educational standards tends to enhance the quality of an educational program. Thus, in situations where an appropriate program certified as meeting state standards was available, a court might, in some circumstances, be justified in denying reimbursement for the costs of an alternative program chosen by the parents that was judged inappropriate partly because it failed to meet important state standards.[20]

---

[20] A similar analysis would apply to the court's consideration at the remedial phase of other procedural obligations imposed on the States by IDEA—such as the "mainstreaming" requirement. See note 1, *supra*; NLC Br. at 20. Although the statute does not directly impose on parents an obligation to see to it that their child is "mainstreamed"—so that the choice of a placement that does not use this method would not, in itself, bar reimbursement in the event of a school district's breach—the incorporation of Section 1412(5)(B) nevertheless represents a congressional judgment that disabled children will ordinarily benefit from integration into regular classrooms. A court could take that judgment into account in assessing the "appropriateness" of a private school education of otherwise uncertain quality that did not practice mainstreaming, especially if an appropriate program that did use mainstreaming was available to the parents.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

AMY L. WAX
Assistant to the Solicitor General

WILLIAM KANTER
JOHN P. SCHNITKER
Attorneys

JUNE 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60312

(8)

No. 91-1523

FILED
JUN 18 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, *et al.*,
Petitioners,
v.
SHANNON CARTER, BY and THROUGH HER FATHER and NEXT FRIEND, EMORY CARTER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF *AMICI CURIAE* OF THE NATIONAL ALLIANCE FOR THE MENTALLY ILL, THE BAZELON CENTER FOR MENTAL HEALTH LAW, THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, AND THE MARYLAND DISABILITY LAW CENTER IN SUPPORT OF RESPONDENTS

STEVEN NEY *
ANDREW S. PENN
MARYLAND DISABILITY LAW CENTER
1400 Mercantile Lane, Suite 242
Landover, Maryland 20785
(301) 925-9871
Attorneys for Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Are parents entitled to equitable reimbursement for temporarily placing their child in an appropriate, though not State-approved, private special education program while awaiting a decision on their complaint about their child's inappropriate publicly funded program?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTERESTS OF *AMICI CURIAE*	1
ARGUMENT	4
I. FAMILIES NEED REIMBURSEMENT OF THE COSTS OF APPROPRIATE, THOUGH UNAPPROVED, PRIVATE SCHOOLS TO ENSURE MEANINGUL ENFORCEMENT OF THE IDEA'S EQUITABLE REMEDY PROVISIONS	4
II. PETITIONERS' POLICY ARGUMENTS AGAINST REIMBURSEMENT ARE SPECULATIVE, HYPOTHETICAL, AND INVALID	9
CONCLUSION	14

TABLE OF AUTHORITIES

Cases Page

Alamo Heights Ind. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986) 5, 7, 8, 14
Bd. of Educ. v. Rowley, 458 U.S. 176 (1982) 14
Burlington Sch. Comm. v. Mass. Dept. of Educ., 471 U.S. 359 (1985) .....*passim*
Carrington v. Comm'ner of Educ., 404 Mass. 290, 535 N.E.2d 212 (1989) 14
Carter v. Florence County Sch. Dist. Four, 950 F.2d 156 (4th Cir. 1991) 5, 7, 9, 10, 11, 13
Doe v. Bd. of Educ. of Tullahoma City Schools, 18 IDELR 1089 (E.D. Tenn. 1992) 10
Doe v. Brookline Sch. Comm., 722 F.2d 910 (1st Cir. 1983) 13
East Long Meadow Pub. Schools, 16 EHLR 395 (Mass. Adm. Hrg. 1989) 12
Garland Ind. Sch. Dist. v. Wilks, 657 F.Supp. 1163 (N.D. Tx. 1987) 10, 13, 14
Hampton Sch. Dist. v. Dobrowolski, 976 F.2d 48 (1st Cir. 1992) 10
Illinois Administrative Appeal, EHLR 507:381 (1986) 7, 8
Livingston v. DeSoto County Sch. Dist., 782 F.Supp. 1173 (N.D. Miss. 1992) 10
Matthew S. v. Sobol, 17 EHLR 575 (S.D. N.Y. 1991) 7
Roland M. v. Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1122 (1991) 10
Shirk v. District of Columbia, 756 F.Supp. 31 (D. D.C. 1991) 11
Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563 (2d Cir. 1989) 6, 7, 11, 14
Vacaville Unified Sch. Dist., 18 IDELR 1278 (Cal. Spec. Ed. Hrg. 1992) 6
W.G. v. Bd. of Trustees of Target Range Sch. Dist., 960 F.2d 1479 (9th Cir. 1992) 5, 11

Statutes

20 U.S.C. §§ 1400 *et seq.* 2, 4
20 U.S.C. § 1415(e)(2) 5, 7, 13, 14
20 U.S.C. § 1415(e)(3) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1523

FLORENCE COUNTY SCHOOL DISTRICT FOUR, *et al.*,
Petitioners,

v.

SHANNON CARTER, BY and THROUGH HER FATHER and NEXT FRIEND, EMORY CARTER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF *AMICI CURIAE* OF THE NATIONAL ALLIANCE FOR THE MENTALLY ILL, THE BAZELON CENTER FOR MENTAL HEALTH LAW, THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, AND THE MARYLAND DISABILITY LAW CENTER IN SUPPORT OF RESPONDENTS

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of the Court.

INTERESTS OF THE *AMICI*

The *Amici* are all organizations whose members or clients include children with disabilities and their families who have a direct and vital interest in the Court's decision in this case. The *Amici* have extensive experience working with school districts on behalf of families to ensure proper implementation of their rights under the special education laws.

The National Alliance for the Mentally Ill (NAMI) is a self-help organization of families of persons with mental illness, persons with mental illness themselves, and their friends. Composed of over one thousand local and state alliance groups all over the country, its goals are mutual support, education, and advocacy for persons with severe mental illness and their families. The NAMI Children and Adolescents Network (NAMI CAN) advocates for improved systems of care for children and adolescents with serious brain disorders or mental illnesses, including those with serious emotional disorders as defined by the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* NAMI CAN advocates for the many children with serious emotional disorders who do not have access to appropriate education and related services in their community public school systems.

The Bazelon Center For Mental Health Law (formerly the Mental Health Law Project) is an independent nonprofit organization that, for twenty years, has been devoted to the development of the law affecting people with mental illness and mental retardation. The Bazelon Center has written model laws, advocated for protective legislation, and participated either as counsel or *amicus curiae* in virtually every civil case concerning mental disability law that has come before this Court. The Bazelon Center submitted briefs as counsel for the plaintiff in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), concerning release of a non-dangerous patient in the absence of treatment; *Addington v. Texas*, 441 U.S. 418 (1979), concerning the standard for civil commitment of persons with mental illness; *Bowen v. City of New York*, 476 U.S. 467 (1986), concerning jurisdiction for class-wide challenges to Social Security Administration practices; and *Washington v. Harper*, 494 U.S. 210 (1990), concerning involuntary administration of medication to a prisoner. It has submitted briefs *amicus curiae* in many other disability law cases as well, including *Mills v.*

Rogers, 457 U.S. 291 (1982); *Parham v. J.L.*, 442 U.S. 584 (1979); *Pennhurst State School v. Halderman*, 465 U.S. 89 (1984); *Board of Education v. Rowley*, 458 U.S. 176 (1982); and *Zinermon v. Burch*, 494 U.S. 113 (1990).

The National Association of Protection and Advocacy Systems (NAPAS) represents Protection and Advocacy Systems established pursuant to Section 113 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6042, and the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. §§ 10801 *et seq.* All fifty-six states and territories of the United States have Protection and Advocacy Systems with the statutory mandate to protect and advocate for the rights of persons with developmental disabilities and persons identified as mentally ill. As part of their statutory mandate, Protection and Advocacy Systems represent numerous school-aged children in matters arising under the Individuals With Disabilities Education Act.

The Maryland Disability Law Center (MDLC) is the agency designated pursuant to the Developmentally Disabled Assistance Bill of Rights Act, 42 U.S.C. § 6042, and the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. §§ 10801 *et seq.*, to represent persons with developmental disabilities and persons identified as mentally ill in Maryland. During the 1992 fiscal year, MDLC provided legal assistance to over 300 school-aged children who experienced difficulty obtaining a free appropriate public education under the Individuals with Disabilities Education Act.

STATEMENT OF THE CASE

Amici incorporate by reference the Statement of the Case contained in Respondents' Brief.

ARGUMENT

I. FAMILIES NEED REIMBURSEMENT OF THE COSTS OF APPROPRIATE, THOUGH UNAPPROVED, PRIVATE SCHOOLS TO ENSURE MEANINGFUL ENFORCEMENT OF THE IDEA'S EQUITABLE REMEDY PROVISIONS.

The issue in this case is whether parents should be reimbursed for temporarily placing their child in an appropriate, though unapproved, private special education program while awaiting a decision on their complaint about their child's publicly-funded program.

In *Burlington Sch. Comm. v. Mass. Dept. of Educ.*, 471 U.S. 359 (1985), the Supreme Court laid out the analytical framework for resolving this issue. The Court began by recognizing the problems faced by families when they seek administrative and judicial review of a school district's proposed IEP: "Whereas in the present case review of a contested IEP takes years to run its course—years critical to the child's development—important practical questions arise concerning interim placement of the child and financial responsibility for that placement." *Burlington*, 471 U.S. at 361.

The Court answered those "practical questions" by holding that the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*, does authorize reimbursement. In so holding, the Court stressed the dilemma faced by children and their parents when they seek administrative and judicial review of a school district's proposed IEP:

> A final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed. In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement.

Burlington, 471 U.S. at 370.

The need to resolve this dilemma consistent with the primary purpose of the IDEA led the Court to require reimbursement as a broad equitable remedy authorized by 20 U.S.C. § 1415(e)(2). While the Court in *Burlington* did not specifically address the issue of reimbursement when the private school has not been approved by the State, the same practical considerations, the same family dilemma, and the same equitable factors require reimbursement of private school costs when the State has not approved the private school, as long as the court finds the private school program appropriate for the child.

Families seeking interim private programs while contesting a proposed IEP often find themselves in dire straits. Precious time is lost as they wade through the appeal process, and their child sits in an inappropriate classroom or in no classroom at all. In Shannon Carter's case, she "continue[d] to fall behind her classmates at an alarming rate." *Carter v. Florence County Sch. Dist. Four*, 950 F.2d 156, 159 (4th Cir. 1991). In *Alamo Heights Ind. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986), a child would have regressed substantially from not receiving any education if his mother had not unilaterally placed him in an unapproved program while challenging the school district's refusal to provide summer school. In *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479, 1481 (9th Cir. 1992), as a result of an inappropriate IEP, a child "began to suffer from physical symptoms of stress, such as gastrointestinal pain and insomnia . . . [H]is mother worried that he was suicidal."

In all of these situations, a child's future is at stake and responsible parents must act quickly. Their rightful concern and priority is not whether the State has approved the private program, but whether that program can help their child now.

Many times, such as in the present case, no State approval list even exists to guide parents in looking for interim placements. States such as South Carolina grant approval on a case-by-case basis using technical criteria that "[p]arents cannot reasonably be expected to know" as a prerequisite to reimbursement. *Vacaville Unified Sch. Dist.*, 18 IDELR 1278, 1280 (Cal. Spec. Ed. Hrg. 1992). Without access to such information, parents can only be expected to know that the school district's proposed placement is inappropriate and that their own interim placement is appropriate. These are the only two prerequisites to reimbursement that this Court spelled out in *Burlington*, and these are the only two requirements that make sense in light of the equities involved in this case.

Even if a State maintains a list of approved schools, parents are often unaware of its existence. The school district possesses all the information about whether a private school has been State-approved. Because of the litigation posture of the case, the school district is not always forthcoming in sharing its knowledge with parents who have challenged its proposed placement. As the court noted in *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563, 567 (2d Cir. 1989):

> We find no indication in the record of any effort on the part of the School District to assist the Tuckers in any way in finding a mutually acceptable alternative to the proposed IEP. We find this troubling, as the School District was no freer than were the Tuckers to leave to the other party the responsibility of searching for an acceptable placement. It may be that having made its recommendation, the School District meant to leave the Tuckers alone with a "take it or leave it" crisis, namely deciding between the alternatives of accepting the proposed IEP or leaving their child at home without a placement. Such an "unfortunate" situation would constitute a "less than complete" safeguarding of John's rights under the EHA.[1]

Unfortunately, a school district may be tempted to present parents with such a "take it or leave it crisis" because the school district lacks the financial incentive to pay for an interim placement pending resolution of the case. As a result, the "parents may be left to their own devices in finding a school that provides the specialized educational environment necessary to educate their children." *Carter*, 950 F.2d at 164.

Often, a child's needs are so unique that there is simply nothing available among the private programs on the school district's list. Parents faced with this predicament have no choice but to temporarily place their child in an unapproved program. For example, in *Matthew S. v. Sobol*, 17 EHLR 575 (S.D. N.Y. 1991), parents unilaterally placed their child with behavioral, learning, and physical disabilities in an unapproved private school only after several private schools proposed by the public school district had rejected him. "Given the present circumstances, where an approved placement was unavailable to Matthew . . ., denial of reimbursement places the petitioner in the untenable position of choosing between providing no education for his son or personally paying for his placement. . ." *Matthew S.*, 17 EHLR at 577. While sympathizing with the parents' dilemma, the New York District Court felt bound by the Second Circuit decision in *Tucker* to deny reimbursement for the cost of the unapproved school. But see, EHLR 507:381 (1986), in which an Illinois state administrative appeal board or-

---

[1] The court in *Tucker* stated that it was unable to consider these equitable factors because the law limited reimbursement only to State-approved schools. But as this Court stated in *Burlington*, 471 U.S. at 374, "equitable considerations are relevant in fashioning relief" under § 1415(e)(2).

dered a school district to reimburse parents for the costs of an unapproved private school where no approved school would accept their child because of his severe emotional and behavioral disabilities. The appeals panel held that the school district could not avoid its responsibility to provide the student a free appropriate education by contending that the private placement was not State-approved, while failing to identify an appropriate approved placement.

As another example, in *Alamo Heights*, when the school district refused to provide a summer program for her mentally and physically disabled son, his mother searched diligently for a private program that could meet his many needs. The only program she could find was located at a rehabilitation hospital. The Court of Appeals held that though the school district itself may not have been required to place the child in this program, it must nonetheless reimburse the mother to some extent for her unilateral interim placement: "Factors that the court may consider in determining whether full or partial reimbursement is in order would include the existence of other, perhaps more suitable, substitute placements, the effort expended by Mrs. G in securing alternative placements, and the general cooperative or uncooperative position of the School District itself." *Alamo Heights*, 790 F.2d at 1161.

Often, as in the present case, parents unilaterally place their child in an unapproved school only after the child has already tried and failed at various public and private programs provided by the school district. The parents then seek the help of outside educational and psychological experts, who evaluate their child and make appropriate placement recommendations. Uppermost in the minds of these parents is whether their experts' placement recommendation will help their child, not whether it has been State-approved. Having been let down by State-approved placements in the past, their primary concern

is an appropriate education for their child, not the formality of State approval. "Under such circumstances, it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides the appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place." *Carter*, 950 F.2d at 164.

II. PETITIONERS' POLICY ARGUMENTS AGAINST REIMBURSEMENT ARE SPECULATIVE, HYPOTHETICAL, AND INVALID.

Petitioners attempt to scare the Court by speculating about the supposed policy implications of allowing reimbursement of the costs of unapproved schools. The Court in *Burlington* rejected many of these same purely hypothetical arguments; they are equally invalid in the present case.

Petitioners contend that reimbursement will create financial hardship by diverting scarce public funds to private schools. Nothing in the record remotely suggests that the right to reimbursement will increase the financial burden on school districts. There is no evidence that upholding the Fourth Circuit's opinion will create an onslaught of parents rushing to pull their children out of public schools. To the contrary, the Fourth Circuit's opinion as well as this Court's holding in *Burlington* place significant limits on the right to reimbursement that prevent any such onslaught.

The law does not allow parents to get reimbursed automatically every time they unilaterally place their child in private school. As this Court pointed out in *Burlington*, 471 U.S. at 373-374, "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by

the school officials was appropriate, the parents would be barred from obtaining reimbursement." See also *Carter*, 950 F.2d at 164, where the Court of Appeals stressed that these "substantial risks . . . function to ensure that our decision will not be a means through which parents can subvert the Act's emphasis on public education."

Numerous courts have applied the *Burlington* requirements to deny reimbursement. *See, e.g., Hampton Sch. Dist. v. Dobrowolski*, 976 F.2d 48 (1st Cir. 1992); *Livingston v. DeSoto County Sch. Dist.*, 782 F.Supp. 1173 (N.D. Miss. 1992); *Doe v. Bd. of Educ. of Tullahoma City Schools*, 18 IDELR 1089 (E.D. Tenn. 1992); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 1122 (1991). These courts are careful to stress that even if the unilateral private placement is superior to an appropriate public placement, reimbursement will be denied; the IDEA requires an appropriate, though not necessarily the best, public placement. *See, e.g., Tullahoma City Schools*, 18 IDELR at 1092. The courts also note that even if a unilateral private placement is superior academically to a public placement, it still may be inferior in its ability to meet a child's mainstreaming needs. In such circumstances, reimbursement again will be denied. *See, e.g., Roland M.*, 910 F.2d at 991; *Dobrowolski*, 976 F.2d at 52.

Even when parents are able to establish their entitlement to reimbursement, the unapproved reimbursable program is often less expensive than an approved program that the school district otherwise would be obligated to reimburse. For example, in *Garland Ind. Sch. Dist. v. Wilks*, 657 F.Supp. 1163 (N.D. Tx. 1987), a mother who challenged a school district's refusal to provide a residential placement could not afford to unilaterally place her child in a private school pending resolution of her court challenge. Instead, she paid for after-school and summer services to supplement the insufficient day program offered by the school district. The court ordered

reimbursement of these supplemental services, which were clearly less expensive than tuition for a State-approved private residential school. *See also, Target Range*, 960 F.2d at 1482, where the Ninth Circuit Court of Appeals ordered reimbursement of the services of a private tutor, which cost less than the long list of State-approved services the parents sought in their legal challenge of the school district's IEP.

Regardless of the amount of costs associated with reimbursement, these costs impose no additional burden on a school district. As this Court pointed out in *Burlington*, 471 U.S. at 370-371, "reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Accord, Shirk v. District of Columbia*, 756 F.Supp. 31, 33-34 (D. D.C. 1991), where the court stressed the need to reimburse parents as a way to prevent unjust enrichment to the school district:

> If the Court were to allow DCPS to avoid payment because of its failure to evaluate Leslie as required, DCPS will have avoided its legal duty to pay for Leslie Shirk's 1989-1990 education. This would reward DCPS for failing to comply with the law and would shift the financial burden for educating a handicapped child from the government to the individual handicapped child's parents. DCPS' failure to comply with the law as well as basic fairness requires that DCPS reimburse plaintiffs . . .

Petitioners also contend that the ruling below would foster inappropriate private school placements.[2] Yet, even the court in *Tucker*, 873 F.2d at 564, n.1, readily recog-

---

[2] While Petitioners now try to paint Trident Academy as inappropriate, they did "not dispute the district court's conclusion that Trident Academy provided Shannon with an appropriate education, which is a prerequisite to reimbursement under *Burlington*." *Carter*, 950 F.2d at 161, n.2. Indeed, South Carolina had approved and funded placement of three other children at Trident Academy. *Id.* at 159.

nized that "[a]n unapproved school is not necessarily an inferior school." Trident Academy and other perfectly appropriate private schools have not been State-approved only because the State does not maintain a list of approved schools. Many other excellent private schools decide on their own not to seek State approval to avoid the cumbersome bureaucratic requirements that go along with it. Other appropriate private schools are not on a State-approved list simply because the State has failed or refused to evaluate the schools. Still others have been approved by the State where they are located, but not by the State where the child resides. *See, e.g., East Longmeadow Public Schools*, 16 EHLR 395 (Mass. Adm. Hrg. 1989).

Petitioners see some inconsistency in the fact that a school district cannot place a child in an unapproved private school but parents can do so and get reimbursed. Yet a school district's formal permanent placement decision involves entirely different considerations than a parent's unilateral interim placement pending resolution of a legal challenge. Reimbursement in that limited context is an equitable remedy that should not be undermined by imposing inapplicable prerequisites. Thus, in *Burlington*, the Court saw no inconsistency in requiring the school district to abide by the stay-put requirements of 20 U.S.C. § 1415(e)(3), but not imposing such a requirement on parents. "If the provision is interpreted to cut off parental rights to reimbursement, the principal purpose of the Act will in many cases be defeated in the same way as if reimbursement were never available." *Burlington*, 471 U.S. at 372.

Petitioners also contend that the decision below is incompatible with the IDEA's goal of fostering consultation and cooperation between parents and educators in developing a child's IEP. This is yet another argument rejected by the Court in *Burlington*. While cooperation and consultation are laudable goals, the Court in *Burlington*, 471 U.S. at 372, recognized that there are times in the administrative and judicial process when it would

be fruitless for parents to seek official approval of their interim placements.

Moreover, the mere fact that parents have placed their child in an unapproved school pending resolution of their legal challenge to the school district's actions does not constitute a lack of cooperation or consultation. In fact, in the present case, before concluding that they had no choice but to place Shannon at Trident Academy, the Carters tried unsuccessfully to work with the school district. *Carter*, 950 F.2d at 157-158. If the parents in some other case are uncooperative, the equitable considerations recognized by the Court in *Burlington* might bar them from getting reimbursement. *See, e.g., Garland*, 657 F.Supp. at 1167, where the court denied reimbursement for a unilateral placement made by a parent before she even notified the school district that she was dissatisfied with her child's IEP.

All of the concerns raised by Petitioners can be addressed by adopting such a case-by-case balancing-of-equities approach. The right to reimbursement derives from the "broad grant of equitable power" contained in 20 U.S.C. § 1415(e)(2). *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 919 (1st Cir. 1983). While declining to enumerate "the specific equitable factors . . . for granting relief," this Court in *Burlington*, 471 U.S. at 374, noted that "equitable considerations are relevant in fashioning relief."

Subsequent appellate and district court decisions have adopted this case-by-case balancing-of-equities approach in determining whether, and to what extent, parents should be reimbursed for the costs of unapproved schools. These courts have weighed the following factors:

1. What alternatives were actually available;
2. The parties' general cooperativeness;
3. The extent of parental compliance with the special education laws pending resolution of their legal challenge;

4. The reasonableness of the parties' positions;
5. Bad faith by either party; and
6. Whether the parents first tried to cooperate with the school district in finding an appropriate placement before filing their appeal.

Alamo Heights, 790 F.2d at 1161; *Carrington v. Comm'ner of Educ.*, 404 Mass. 290, 535 N.E. 2d 212 (1989); *Burlington*, 736 F.2d 773, 801 (1st Cir. 1984). See also, *Tucker*, 873 F.2d at 567. This case-by-case approach, not a blanket rule that arbitrarily denies reimbursement of all unapproved schools, no matter how appropriate, would give substance to the equitable remedies provided by 20 U.S.C. § 1415(e)(2).

As this Court recognized in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202 (1982), there is no single test for determining whether a child with disabilities is receiving a free appropriate education. *Accord, Garland*, 657 F. Supp. at 1166. In the limited situation posed by reimbursement cases, parents should not be restricted to the single litmus test of State approval in their search for an appropriate interim education for their child.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

STEVEN NEY *
ANDREW S. PENN
MARYLAND DISABILITY
LAW CENTER
1400 Mercantile Lane, Suite 242
Landover, Maryland 20785
(301) 925-9871
Attorneys for Amici Curiae

* Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. The Supreme Court rule in *Burlington* fairly balances the interests of the parties and is necessary to assure that an appropriate education, as defined by the Supreme Court in *Rowley*, is made available to the student.	3
A. Was an appropriate offering made by the public school?	4
(1) The role of evaluation in an appropriate offering.	4
(2) Was the IEP reasonably calculated to confer benefit?	7
B. Did the private services confer benefit?	9
II. The prospect of a public school having to pay for private services is not the undue burden claimed by Florence County and the amici curiae supporting Petitioner's position.	12
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

Alamo Heights v. State Board of Educ., 790 F.2d 1153 (5th Cir. 1986) 17

Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980) 16

Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176 (1982) 4,5,10,14

Carter v. Florence County School District Four, 950 F.2d 156 (4th Cir. 1991) 8,9,11,17

Cordero by Bates v. Pennsylvania Department of Education, 795 F. Supp. 1352 (M.D. Pa. 1992) 15,16

Hendricks v. Gilhool, 709 F. Supp. 1362 (E.D. Pa. 1969) 16

Honig v. Doe, 484 U.S. 305 (1988) 15

Kruelle v. New Castle County School Dist., 642 F.2d 687 (3d Cir. 1981) 15,16

Lester H. v. Gilhool, C.A. No. 86-6852, slip op. (E.D. Pa. Nov. 9, 1989), *aff'd*, 916 F.2d 865 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1317 (1991) 15

Muth v. Central Bucks School Dist., 839 F.2d 113 (3d Cir. 1988), *rev'd on other grounds*, 491 U.S. 223 (1989) 16

School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts, 471 U.S. 359 (1985) 3,4,10,12,14

Town of Burlington v. Dept. of Educ., 736 F.2d 773 (1st Cir. 1984) 13

Wilson v. McDonald, No. 85-506, slip. op. (E.D. Ky. May 15, 1987) *reprinted in* 1987-88 Education for the Handicapped Law Rep. 558:364 (July 31, 1987) 16

STATUTES:

20 U.S.C. §1400(c) 3

Table of Authorities Continued

Page

20 U.S.C. §1401(a)(15) 4

20 U.S.C. §1401(a)(20)(c) 9

2O U.S.C. §1411(c)(4) 14

20 U.S.C. §1413(a)(3)(A) 15

20 U.S.C. §1413(a)(4)(B) 12

20 U.S.C. §1413(b) 14

20 U.S.C. §1414(d) 14

20 U.S.C. §1415a (Supp. 1993) 3

29 U.S.C. §794 6

REGULATIONS:

34 C.F.R. §104.3(j)(2)(i)(B) 6

34 C.F.R. §300.224 14

34 C.F.R. §300.360(a)(3) 14

34 C.F.R. §300.380-383 15

34 C.F.R. §300.400 12

34 C.F.R. §300.401(a) 12

34 C.F.R. §300.403(b) 4

34 C.F.R. §300.501-514 3

34 C.F.R. §300.540-543 5,6

34 C.F.R. §300. Appendix C 7,9

42 Fed. Reg. 65081 (Dec. 29, 1977) 5

LEGISLATIVE MATERIALS:

1975 U.S. Code Cong. & Admin. News 1425 4

1990 U.S. Code Cong. & Admin. News 1729 7

INTEREST OF AMICI CURIAE

Pursuant to Rule 37 of the Rules of the Supreme Court, amici **Learning Disabilities Association of America and Advocacy, Incorporated** file this brief in support of Respondents Shannon and Emory Carter. Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

Learning Disabilities Association of America was formed 30 years ago because of the recognition among parents and professionals that students with this "hidden handicap" were facing increased problems as our society placed greater emphasis on learning. The LDAA now has over 50,000 members in 50 state affiliates and over 700 local chapters. The membership, composed of individuals with learning disabilities, family members, and concerned professionals, advocates for the over two (2) million students of school age with this disability. One-half of all students with disabilities in America's schools are learning disabled, as is the student who is the subject of the instant case.

LDAA has a professional advisory board of distinguished scientists and practitioners in education, medicine, social services, law and other fields directly related to learning disabilities. **LDAA** and its state affiliates and local chapters work directly with school systems in planning and implementing programs for early identification and diagnosis of this disability as well as programs for remediation in regular classes, resource rooms and other special settings. **LDAA** produces a professional journal, *Learning Disabilities: A Multidisciplinary Journal.*

Advocacy, Incorporated is one of the "protection and advocacy" systems created by Congress in Section 113 of Public Law 94-103, The Developmentally Disabled Assistance and Bill of Rights Act (1975), 42 U.S.C. Sec. 6042, as amended. Advocacy, Inc. has operated as the Texas agency to protect the rights of persons with developmental disabilities for over fifteen (15) years. In that capacity, Advocacy, Inc. has worked with thousands of citizens with

disabilities and has represented many of them in court, including residents of a group home for adults with mental retardation in *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 373 (1985), and a student who needed school health services in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984).

Advocacy, Inc. served as amicus curiae in *Alamo Heights ISD v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986); *Detsel v. Ambach*, 637 F. Supp. 1022, (N.D.N.Y. 1986), *aff'd*, *Detsel v. Board of Education of Auburn*, 820 F.2d 587, (2d Cir. 1987), *cert. denied* 108 S.Ct. 495 (1987); *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990); *Barnett v. Fairfax County School Board*, 927 F.2d 146 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 175 (1991); *Schuldt v. Mankato Independent School District No. 77*, 937 F.2d 1357 (8th Cir. 1991); and *Rapid City School District 51/4 v. Vahle*, 733 F. Supp. 1364 (D.S.D. 1990), aff'd 922 F.2d 476 (8th Cir. 1990). Advocacy, Inc.'s representation of people with disabilities in these actions and others has served to benefit students with disabilities who are entitled to a free appropriate public education.

STATEMENT OF THE CASE

Amici Curiae adopt the statement of the case and the statement of facts as detailed in the brief of Respondents.

SUMMARY OF ARGUMENT

Congress recognized that disputes between school districts and parents would arise with regard to appropriate education, and provided that these disagreements would be the subject of due process procedures. While the administrative hearing officer or the trial court is considering the dispute, the student with a disability must remain in the current educational placement. If that is intolerable to the parents, they may choose to make a unilateral placement at their own expense and seek reimbursement from the school district. This Court adopted a rule in *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts* which fairly balances the interests of the parties where the parents feel compelled to take such action.

Requiring a public school to reimburse parental expenses for a unilateral placement at a private school does not work an undue burden on the local educational agency or the state. There are steps available to the state and local educational agencies to stop the flow of dollars to the private service provider or to mitigate the damages. The local school and state agency in this case did not avail themselves of these options.

I. THE SUPREME COURT RULE IN *BURLINGTON* FAIRLY BALANCES THE INTERESTS OF THE PARTIES AND IS NECESSARY TO ASSURE THAT AN APPROPRIATE EDUCATION, AS DEFINED BY THE SUPREME COURT IN *ROWLEY*, IS MADE AVAILABLE TO THE STUDENT.

The basic purpose of the Individuals with Disabilities Education Act, or IDEA (previously called the Education of the Handicapped Act) is to assure an offering of a free appropriate public education to every eligible student with a disability.[1] Such an offering must follow certain steps and includes parental participation.[2] This Court recognized that there would not always be a consensus between the school officials and the parents and noted that Congress had developed procedural safeguards to resolve substantive disagreements.[3] One of those disagreements is predictably that the public school offering is viewed by the parents as so inadequate that they feel compelled to purchase services privately for their child. This Court recognized that both Congress and the Executive Branch contemplated,

---

[1] 20 U.S.C. § 1400(c) (Supp. 1993); *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 367 (1985).

[2] 20 U.S.C. § 1415a (Supp. 1993); 34 C.F.R. § 300.501-514.

[3] *Burlington*, 471 U.S. at 368.

and provided for, that eventuality.[4] Such a dispute has arisen in this case.

A. Was An Appropriate Offering Made By The Public School?

The *Burlington* test first asks whether the public school offered an appropriate program. In *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley* this Court ruled that for a school district to offer an appropriate program it not only must comply with the Act's procedures, but that the Individualized Education Program (IEP) must be reasonably calculated to confer educational benefit.[5] This Court said further that the IEP must be "individualized,"[6] "personalized,"[7] "tailored,"[8] and "specially designed"[9] to meet the "unique needs"[10] of that one child. Without such personalization an IEP cannot be reasonably calculated to confer benefit.

(1) The Role of Evaluation in an Appropriate Offering

How does the school determine the unique needs to be addressed on an IEP? The school is required to assess those needs through a process of identification and evaluation. Learning disabled students, such as Shannon Carter, are at a unique disadvantage in this identification and evaluation process because they are often thought of not as being "disabled" but rather as lazy students who are not trying hard enough. When Congress enacted the Education for All Handicapped Children Act in 1975 it defined specific learning disability.[11] Congress realized then

---

[4] *Burlington*, 471 U.S. at 371, quoting 1975 U.S. Code Cong. & Admin. News, pp. 1425, 1456 and the regulations at 34 C.F.R. § 3[illegible]403(b).

[5] 458 U.S. 176, 207 (1982).

[6] *Rowley*, 458 U.S. at 201.

[7] *Rowley*, 458 U.S. at 197, 203 and 210.

[8] *Rowley*, 458 U.S. at 181.

[9] *Rowley*, 458 U.S. at 188, 201.

[10] *Rowley*, 458 U.S. at 181, 188.

[11] 20 U.S.C. § 1401(a)(15).

how difficult it was to define learning disability and directed the Commissioner of Education to fully explain through regulations what evaluation must be performed when a school considers whether a student is learning disabled.[12] The resulting regulations[13] emphasize how careful public schools must be when they identify, evaluate and design programs for students with learning disabilities.

In Shannon's case, the school district failed to identify the learning disability in its first try at evaluation. The school district told Shannon's parents that their daughter could do the work if she wanted to but that she lacked motivation.[14] As a result of Florence County's determination, Shannon was treated like many children, as noted in *Rowley*, "left to fend for themselves in classrooms designed for the education of their nonhandicapped peers."[15] Shannon's parents assumed she was not trying and disciplined her at home for her bad grades.[16]

To assure that this important distinction is made between a child who is merely unmotivated and a student who truly has a disability which warrants special services, Congress and the Executive Branch expected school districts to follow the detailed procedures for evaluating for

---

[12] See 42 Fed. Reg. 65081 (Dec. 29, 1977).

[13] Now published at 34 C.F.R. § 300.540-543 as "Additional Procedures for Evaluating Children with Specific Learning Disabilities."

[14] Joint Appendix 49 at Fourth Circuit, quoted in Respondents Brief in Opposition to Certiorari at p. 2.

[15] *Rowley*, 458 U.S. at 191.

[16] Joint Appendix 49 at Fourth Circuit, quoted in Respondents Brief in Opposition to Certiorari at p. 3. Even after Florence County finally did identify Shannon as learning disabled and proposed its first IEP for her, the school district evaluation used at the IEP meeting still described her learning problem as "one which is felt to have been acquired and fostered over a period of time in which (Shannon) did not apply the skills which she seems to possess." Further, the evaluator at that meeting indicated her problem was emotionally based and that she was not trying in the classroom. See Joint Appendix 363 at Fourth Circuit, quoted in Respondents Brief in Opposition to Certiorari at p. 3.

a learning disability.[17] The reason Florence County missed Shannon's disability in its first attempt at assessment is that for this important inquiry the school district used an unqualified examiner who did not meet state or federal standards required for the task.[18] That individual determined, for the public school district, that Shannon Carter was not learning disabled within the meaning of the IDEA.[19] Such a determination under the IDEA requires not only a properly credentialed examiner but also a multidisciplinary team[20], classroom observation,[21] and a written report.[22] In the instant case, the unqualified person conducting this inquiry worked alone rather than in a team,[23] did not conduct classroom observation,[24] and could not produce any evidence that there had ever been a written report.[25] Despite these deficiencies, the examiner was allowed to make the finding for the public school district

---

[17] See note 13, *supra*.

[18] Joint Appendix at 3-4.

[19] There is no evidence that the school additionally considered at that time Shannon's potential eligibility for services under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which lists "specific learning disabilities" in its regulations at 34 C.F.R. § 104.3(j)(2)(i)(B) and requires special education and related services when determined appropriate. *Amici* are not raising this point originally in this Court at this late date for a substantive deliberation but simply mention it because of Florence County's insistence that the private school chosen by the parents did not meet all legal requirements. The evidence shows that Florence County itself ignored important requirements. Had the school used a qualified examiner under the IDEA and also inquired into the area of Section 504 eligibility, it might not only have discovered the learning disability but also the Attention Deficit Disorder and severe depression that substantially limited Shannon's ability to learn.

[20] 34 C.F.R. § 300.540.

[21] 34 C.F.R. § 300.542.

[22] 34 C.F.R. § 300.543.

[23] Joint Appendix, at 4.

[24] Joint Appendix, at 4.

[25] Joint Appendix, at 4.

that Shannon was not learning disabled and Florence County failed to address her unique educational needs.

When Shannon received her first thorough evaluation, from independent sources, the evaluators identified a number of Shannon's deficits, any one of which could confer eligibility for services under the IDEA. The evaluation showed that Shannon had a neurologically-based learning disability with severe visual perceptual problems, such a severe deficit in reading at the ninth grade level that she was functionally illiterate, severe attention deficit disorder with hyperactivity, major depression with suicidal thoughts, and such lowered self-esteem that she had basically given up on school.[26] Without the full evaluation required by federal law there is no way that the school district could propose a program that would be individualized, personalized, tailored and specially designed to meet Shannon's unique needs.

(2) Was The IEP Reasonably Calculated To Confer Benefit?

After the school district evaluated Shannon a second time, two years later, and identified her as eligible for specially designed instruction and related services, they met as a team with the parents to propose an IEP. The school district must propose what is actually needed by the student and not just what they have available.[27] Despite this requirement, Florence County limited the discussion to what they already had available for other students.

The school first proposed a "resource room" for two periods each day which contained seriously emotionally dis-

---

[26] Joint Appendix, at 17-18.

[27] 34 C.F.R. Part 300, Appendix C, question and answer 44. As the most recent example of Congress' continuing insistence on this point, Congress stated in the IDEA amendments, in regard to the related service of social work, the school must "base the IEP recommendations on the individual student's need for social work services rather than on the perceived availability of such services." H. Rept. 101-544 at p. 7. Reprinted at 1990 U.S. Code Cong. & Admin. News 1729.

turbed and mentally retarded students.[28] The parents disagreed with that offer. The circuit court observed that there was no evidence that the school's proposal would have provided an appropriate education and, it is conceivable, according to the court, that the resource room might have been even less appropriate than other alternatives.[29]

The parents then inquired about itinerant learning disability services. The school response was a proposal of such services three times per week to be carried out during Shannon's classes in the regular classroom. The parents agreed to try that offering for the remaining weeks of the school year but judged it to be unsuccessful.[30] The district court ruled that this proposal also failed to satisfy the requirements of the IDEA as it was not reasonably calculated to confer benefit.[31]

The school district did not explore any further alternatives although many school districts would have considered, for a student like Shannon, a smaller class size with much more structure and intensive instruction for a longer part of the day than two class periods. That is, in fact, what independent experts who testified indicated that Shannon needed.[32] The public school district stated they have never offered any learning disability class like that in their school district because they had not been able to locate any personnel certified in learning disabilities to conduct the class.[33]

---

[28] *Carter v. Florence County School District Four*, 950 F.2d 156, 158-59 (4th Cir. 1991). In a resource room offering the student would typically leave the regular classroom for a period and work on specific IEP goals in a smaller class size with a more structured environment. Shannon would spend one period concentrating on reading and another period concentrating on mathematics.

[29] *Carter*, 950 F.2d at 160.

[30] *Carter*, 950 F.2d at 159.

[31] *Carter*, 950 F.2d at 159.

[32] Joint Appendix at pp. 9, 21.

[33] Joint Appendix, at 6-7 and 25.

The goals that the school district set for Shannon on the proposed IEP were also found to be inappropriate. The school proposed an increase in reading by the end of one year of instruction from Shannon's current level of 5.4 (fifth year, fourth month) to 5.8 and an increase in mathematics from her current level of 6.4 to 6.8.[34] Since the school district's proposal would take 1.0 year of instruction to achieve that .4 growth, Shannon would in effect fall even further behind.

Both the district court and the circuit court found that this proposal was not reasonably calculated to confer benefit. The district court stated that the school district's proposed goal "ensured the program's inadequacy from its inception."[35] This goal setting is not just an idle exercise. It is a specific statutory requirement of the IDEA[36] which dictates the allocation of resources needed to meet such a goal.[37] If this severely learning disabled student were proposed for a full year's growth in reading and mathematics in one year of instruction, more resources would have to be allocated by the public school district than if the proposal were for merely .4 growth by the end of the year of instruction. The lower goal proposed by the school would allow them to expend fewer resources.

Thus the lower courts found the school district's goal setting and both alternative program offerings to fail the *Rowley* test: they were not reasonably calculated to confer benefit.

B. Did The Private Services Confer Benefit?

The IDEA provides parents with a choice when faced with this quandary: accept inappropriate services from the public school or procure appropriate services privately and seek reimbursement under *Burlington*. That is what Shan-

---

[34] *Carter*, 950 F.2d at 159.

[35] *Carter*, 950 F.2d at 159.

[36] 20 U.S.C. § 1401(a)(20)(C).

[37] 34 C.F.R. 300. Appendix C, I (2)(a), (c), (d) and (e).

non's parents did, selecting the Trident Academy which specialized in severe learning disabilities. This Court described the situation perfectly in *Burlington*:

> In the meantime, the parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. If they choose the latter course, which conscientious parents who have adequate means and who are reasonably confident of their assessment normally would, it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials. If that were the case, the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant "appropriate" relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.[38]

Thus, the *Burlington* analysis provides for a proper balancing of interests between school and parents. The public school district, under *Rowley*, is not required to offer the best program possible and does not have to spend its funds excessively for one student.[39] But it must at least meet the minimal definition of "appropriate" or risk having parents seek private services. On the other hand, if the parents feel that the public school offering is insufficient to confer an appropriate amount of benefit, then they can supplement it or replace it with private services and seek public reimbursement. When the court reviews the services

---

[38] *Burlington*, 471 U.S. at 370.

[39] *Rowley*, 458 U.S. at 200.

purchased by the parents, the parents are at risk of losing their investment if they cannot show that the public school offering was inappropriate and that the privately procured services conferred benefit.

The key to determining whether to allow reimbursement is application of the *Rowley* standard: whether the school district's IEP was, or was not, reasonably calculated to confer benefit, coupled with the *Burlington* standard: whether the private services did, or did not, confer benefit.

What of the parents' choice of the private Trident Academy? Was *Burlington* satisfied? Did the private services confer benefit? Testimony showed that Shannon increased more than one year of growth in reading and in math for each of her three years of instruction at Trident.[40] In fact, there was evidence she finished the private program reading at the twelfth grade level.[41]

The public school says do not look at that outcome: focus instead on input criteria. The public school states that the Trident Academy could not provide an appropriate education because it did not meet state standards: it was not state approved. However, in South Carolina, there is a curious "catch 22." A program becomes state approved if the local school district asks for the placement at the private school.[42] Since Florence County totally opposed the placement at Trident Academy they did not ask for approval. Without state approval, Florence County argues, the placement does not meet state standards and the parents should not be reimbursed. Florence County further argues that two of the teachers at Trident Academy did not have South Carolina teaching certificates, and that the private school did not conduct traditional IEPs.[43]

---

[40] *Carter*, 950 F.2d at 159.

[41] Joint Appendix, at 12.

[42] *Carter*, 950 F.2d at 161.

[43] *Carter*, 950 F.2d at 161. The IEPs were indeed not traditional: the court notes that student progress is measured, and IEP goals are revised, four times each year.

Shannon's placement could have been state approved had Florence County requested it. While Shannon was there, three other students at the Trident Academy were approved because their local districts had asked for approval, and South Carolina has never refused to approve a placement at the Trident Academy.[44] The Trident Academy failed to be state approved for Shannon not because it failed to meet state standards, but because Florence County kept it from being approved. Had the state approval process been invoked, the state would have had the duty to assure that any perceived defects (e.g., teacher certification, IEP forms) were brought up to state requirements.[45] Why can Florence County use an unqualified and unlicensed diagnostician but argue that Shannon's parents cannot be reimbursed for sending Shannon to a qualified although not state approved private placement?

The Trident Academy placement was "proper" under the Act within the meaning of *Burlington*.

II. THE PROSPECT OF A PUBLIC SCHOOL HAVING TO PAY FOR PRIVATE SERVICES IS NOT THE UNDUE BURDEN CLAIMED BY FLORENCE COUNTY AND THE AMICI CURIAE SUPPORTING PETITIONER'S POSITION.

First, the parent, not the school district, has the heavy burden. The only way that a public school would be forced to pay for privately procured educational services is if the parent can prove that the public program failed to meet the *Rowley* standard and that, per *Burlington*, the private services conferred benefit. As this Court noted in *Burlington*, the parent must be willing to risk the funds initially and secure the services of an attorney to pursue a judicial decision in the parents' favor. As noted in *Rowley* and *Burlington*, and as is obviously true in the instant case, these proceedings take years to conclude.[46] The bur-

[44] Joint Appendix, at 14.

[45] 20 U.S.C. § 1413(a)(4)(B), 34 C.F.R. § 300.400, 401(a)(1) and (3).

[46] *Burlington*, 471 U.S. at 370.

den of attacking the school district's appropriateness under *Rowley*, the burden of proof under *Burlington*, and the length of time that private services have to be funded[47] are substantial obstacles to parents attempting reimbursement.

Second, if the public school district complies with the IDEA and offers an appropriate program, it will not be responsible for the services that parents purchase unilaterally. If there is a dispute as to the appropriateness of the school district's offering, the school can consider alternatives that bring the school proposal up to the *Rowley* level, thus ending a parent's claim to reimbursement. This Court's *Rowley* standard is not insuperably high; it is generally considered a conservative standard. No public school should be able to refuse to come up to this standard and then claim that they should not have to pay for private services.

Third, the school district can prevent a multi-year claim building up for private services by annually offering a new IEP that would meet the *Rowley* standard. In *Burlington*, the circuit court noted:

> We think that pending review of an earlier IEP, local educational agencies should continue to review and revise IEPs in accordance with applicable law. . . Without an IEP as a starting point, the court is faced with a mere hypothesis of what the Town would have proposed and effectuated during subsequent years. . . *The continuation of the IEP process during the pendency of litigation may assist in promoting settlements. Also, subsequent IEPs that have not been appealed to the state agency may still provide useful evidence for the district court in fashioning 'appropriate' relief.* (emphasis added).[48]

[47] Shannon's parents began incurring these private expenses at the start of the 1985-86 school year.

[48] *Town of Burlington v. Dept. of Educ.*, 736 F.2d 773, 794 (1st Cir. 1984).

Under this attempt at mitigation, the public school could have reviewed Shannon's progress at the private school, and the methodology that was proving successful, and offered to match it on a new IEP. If the court later found that the new IEP was reasonably calculated to confer benefit, the parents would not receive reimbursement after that public school proposal had been made.[49] A school that does not offer to revise the IEP and chooses to let the bill run up year after year should not complain later that the bill is too high.

Fourth, if the local school does not have the resources to offer an appropriate IEP they may notify the state education agency and ask that the state provide the services directly or through contract.[50] Congress contemplated that there will be small school districts with one or more children beyond their means to educate.[51] Rather than offering an inappropriate IEP because the local school district is unable[52] to meet the requirements of an appropriate program, Congress provided that statewide resources would be made available through the state education agency. In that way, there would be no undue burden faced by one lone school district.

Fifth, each local district is to annually prepare a local plan, under the comprehensive system of personnel development, which indicates their needs and their plan for meeting them.[53] This plan was referred to by this Court as ". . . a clear statutory directive. . . ."[54] After Shannon's evaluation, the local public school could have identified the need for a skilled teacher certified in learning disabilities who could operate an intensive small class size approach

[49] *Burlington*, 471 U.S. at 374.

[50] 20 U.S.C. § 1414(d).

[51] 20 U.S.C. §§ 1411(c)(4), 1413(b) and 1414(d).

[52] See 34 C.F.R. § 300.360(a)(3).

[53] 34 C.F.R. § 300.224.

[54] *Rowley*, 458 U.S. at 207.

and alerted the state, through the local plan application, that they needed state support in meeting this need.

Sixth, the state education agency, pursuant to its duties under the comprehensive system of personnel development,[55] should have identified this need on their own initiative. When the federal district court in the instant case found there were inadequate resources in the local public school district, the state should have exercised its initiative and inquired on its own to see if the local district required assistance to meet the statutory level of an appropriate offering for Shannon. This point was succinctly summarized by Judge Rambo in the recent case *Cordero by Bates v. Pennsylvania Department of Education*:[56]

> As defined by the IDEA, the state's role amounts to more than creating and publishing some procedures and then waiting for the phone to ring. The IDEA imposes on the state an overarching responsibility to ensure that the rights created by the statute are protected, regardless of the actions of local school districts. *Honig v. Doe*, 484 U.S. 305 (1988); *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 696-97 (3d Cir. 1981); *Lester H. v. Gilhool*, C.A. No. 86-6852, slip op. (E.D. Pa. Nov. 9, 1989), *aff'd*, 916 F.2d 865 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1317 (1991); *Hendricks v. Gilhool*, 709 F. Supp. 1362, 1367-69 (E.D. Pa. 1989). The state must assure that in fact the requirements of the IDEA are being fulfilled. 20 U.S.C. § 1412(6); 34 C.F.R. § 300.600.
>
> Accordingly, with regard to the state's liability in this action, the fact that local agencies are not performing up to par or that parents are not fulfilling their duties becomes irrelevant. It is the state's obligation to ensure that the systems it

[55] 20 U.S.C. § 1413(a)(3)(A), 34 C.F.R. § 300.380-383.

[56] 795 F. Supp. 1352 (M.D. Pa. 1992).

put in place are running properly and that if they are not, to correct them. This is the crux of the state's liability in this matter. . . .[57]

The IDEA requires that a state *assure* that . . . a practical method is developed and implemented to determine which children . . . are not currently receiving needed special education and related services." 20 U.S.C. § 1412(2)(C) (emphasis added); *see also* 34 C.F.R. § 300.128(a)(2). A state must, moreover, ensure through oversight that state and local agencies, including school districts, fulfill the dictates of the Act. 20 U.S.C. § 1412(6); *see also* 34 C.F.R. § 300.600. The Department of Education is further required, so that some weight is given to its oversight function, to adopt enforcement procedures "including sanctions." 34 C.F.R. § 300.575. If local districts are failing to fulfill their mandates under the IDEA and state law, the state is required to step in and provide such assistance directly. 20 U.S.C. § 1414(d); *see also Muth v. Central Bucks School Dist.*, 839 F.2d 113, 129 (3d Cir. 1988), *rev'd on other grounds*, 491 U.S. 223 (1989) (if children are not receiving appropriate education, "the state agency is required to provide that education by contract or otherwise."); *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 696-97 (3d Cir. 1981); *Battle v. Pennsylvania*, 629 F.2d 269, 278 (3d Cir. 1980); *Hendricks v. Gilhool*, 709 F. Supp. 1362, 1367-69 (E.D. Pa. 1989); *Wilson v. McDonald*, No. 85-506, slip. op. (E.D. Ky. May 15, 1987), *reprinted in* 1987-88 Education for the Handicapped Law Rep. 558:364 (July 31, 1987).[58]

If the state had upgraded the local school district's program, or had provided the needed services directly or

[57] *Cordero*, 795 F. Supp. at 1362.

[58] *Cordero*, 795 F. Supp. at 1360.

through contract, it would cut off any further claim for reimbursement from the parents.

Seventh, even when a public school is required to reimburse parents for private services, the courts have fashioned a standard that provides reasonableness. After this Court's ruling in *Burlington*, the Fifth Circuit Court of Appeals faced a request for reimbursement for private services.[59] That court recognized that fashioning appropriate relief was a balancing test and concluded:

> Factors that the court may consider in determining whether full or partial reimbursement is in order would include the existence of other, perhaps more suitable, substitute placements, the effort expended by Mrs. G. in securing alternative placements, and the general cooperative or uncooperative position of the school district itself. Hence, pursuant to *Burlington* we remand this issue to the district court to determine the appropriate amount of reimbursement due Mrs. G. under the particular circumstances of this case.[60]

With this approach, the local school can mitigate any claim against it, if it chooses to do so. If Florence County could point to a state approved school that was available to Shannon, or could point to a school close enough to the parents' home so that boarding costs would not be necessary, or could point to an appropriate school that was less expensive than the Trident Academy, then a court determining the appropriate amount of reimbursement would likely cap the amount of reimbursement at the lower level. However, if the Trident Academy is the only appropriate school the parents could find and no alternatives were being suggested by Florence County, one could expect the type of reimbursement awarded by the district court and affirmed by the Fourth Circuit.[61]

[59] *Alamo Heights v. State Board of Educ.*, 790 F.2d 1153 (5th Cir. 1986).

[60] *Alamo Heights*, 790 F.2d at 1161.

[61] *Carter*, 950 F.2d at 164-65.

The school district in this case should not be allowed to propose an inappropriate program, leave the parents to seek other services, refuse to revise their program offering for three years, not notify the state of their needs, not avail themselves of any of the means to mitigate costs, and then complain about the amount of the reimbursement awarded.

CONCLUSION

This Court in *Rowley* and in *Burlington*, and other courts interpreting those decisions, have given ample guidance to public school districts in regard to the standard they must meet in making an appropriate offering under the Act. Meeting those standards is not an undue burden on the public schools. When a public school fails to meet this burden, it should not be able to block a parent who must turn to private services to enable their child to receive the appropriate program offering Congress intended.

For the above-cited reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

REED MARTIN,* *Of Counsel*
WISEMAN, DURST & TUDDENHAM
1004 West Avenue
Austin, Texas 78701
(512) 479-5017
**Counsel of Record*
for Amici Curiae

MARK S. PARTIN
MELISSA A. EASON
ADVOCACY, INCORPORATED
7800 Shoal Creek
Suite 171-E
Austin, Texas 78757
(512) 454-4816
Counsel for Amici Curiae

June 12, 1993

(12)

No. 91-1523

FILED
JUN 15 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM,ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE NATIONAL HEAD INJURY FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

CRAIG DENMEAD
(Counsel of Record)
KEVIN M. MALONEY
DEBORAH A. BONARRIGO
DENMEAD & MALONEY
37 West Broad Street
Suite 1150
Columbus, Ohio 43215-4189
(614) 228-5271
Counsel for Amicus Curiae

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the parents or guardian of a child with a learning disability are entitled to state reimbursement under the Individuals with Disability Education Act ("IDEA") when they unilaterally place their child in a private school that does not meet state educational standards or in other respects satisfy the criteria of a "free appropriate public education" ("FAPE") which the state is required to provide under 20 U.S.C. §§1401(a)(18) and 1412(1) as a condition of receiving federal funding under the Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 5

STATUTORY SCHEME AND SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. THE LEGISLATIVE HISTORY BEHIND IDEA CLEARLY ESTABLISHES THAT BY ENACTING THIS ACT, CONGRESS INTENDED ITS OVERRIDING PURPOSE AS ONE OF PUBLIC SUPPORT FOR SPECIAL EDUCATION AND RELATED SERVICES TO CHILDREN WITH DISABILITIES. 11

II. THE LEGISLATIVE HISTORY BEHIND IDEA, AS WELL AS THE LANGUAGE FOUND WITHIN THE ACT ITSELF, CLEARLY ESTABLISHES THAT CONGRESS INTENDED A SECTION 1413(a)(4)(B) PLACEMENT TO MEET STATE STANDARDS ONLY WHEN THE PLACEMENT IS MADE BY PUBLIC SCHOOL AUTHORITIES, NOT WHEN THE PLACEMENT IS UNILATERALLY MADE BY THE PARENTS OR GUARDIAN OF THE CHILD WITH THE DISABILITY. 17

III. WHEN STATE EDUCATION AUTHORITIES FAIL TO SATISFY THEIR STATUTORY OBLIGATION TO PROVIDE A CHILD WITH A DISABILITY AN APPROPRIATE EDUCATION, THE REMEDIAL LANGUAGE FOUND WITHIN SECTION 1415(e)(2) OF IDEA, WHICH CONFERS BROAD EQUITABLE AUTHORITY UPON COURTS TO GRANT APPROPRIATE RELIEF, CLEARLY ESTABLISHES CONGRESS' INTENT TO HAVE THE PARENTS OR GUARDIAN OF SUCH A CHILD REIMBURSED FOR THE COSTS OF A SPECIAL EDUCATION AND RELATED SERVICES IN A PRIVATE SCHOOL UNILATERALLY CHOSEN BY THEM, EVEN THOUGH THE PRIVATE SCHOOL DOES NOT MEET THE STANDARDS OF THE STATE EDUCATION AGENCY, BUT OTHERWISE ADDRESSES THE CHILD'S UNIQUE NEEDS AND PROVIDES THE CHILD WITH AN APPROPRIATE EDUCATION.. 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases: Page

Antkowiak by Antkowiak v. Ambach,
838 F.2d 635 (2nd Cir.1988) 16

Burlington School Comm. v. Massachusetts Dept. of Ed., 471 U.S. 359 (1985) 22,23,24,25

California v. American Stores Co.
495 U.S. 271 (1990) 23

Carter v. Florence Cty. School Dist. Four,
No. 4:86-2028-2 (D.S.C. Jan. 30, 1991)
(Findings of Fact at f.n. 2). 2

Carter v. Florence Cty. School Dist. Four,
950 F.2d 156 (4th Cir. 1991) . . 5,11,17,18,19,21,23

Diamond v. McKenzie, 602 F.Supp. 632 (1985) 16

Doe v. Brookline School Committee,
722 F.2d 910 (1st Cir. 1983) 11,22,23

Hall v. Cole, 412 U.S. 1 (1973) 23

Hendrick Hudson Dist. Bd. of Educ. v. Rowley,
458 U.S. 177 (1982) 9,12,15

Honig v. Doe, 484 U.S. 305 (1988) 13,20

Mills v. Board of Educ. of D.C.,
348 F. Supp. 866 (1972) 13,14

Porter v. Warner Holding Co.
328 U.S. 395 (1946) 23

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1982) 23

Statutes and Regulations:

Individuals with Disabilities Education Act,
(formerly the Education of the Handicapped Act,
1975) 20 U.S.C.A. §§1400 *et seq.* (West 1990 ed.
& Supp. 1991) 3
20 U.S.C. §1400(c) 10,24
20 U.S.C. §1401(a)(1)(A) 3
20 U.S.C. §1401(a)(18) 18
20 U.S.C. §1401(a)(18)(A) 15
20 U.S.C. §1401(a)(18)(B) 15,18,21
20 U.S.C. §1411-1415, 1420 10
20 U.S.C. §1412(1) 10
20 U.S.C. §1412(5)(B) 10,20
20 U.S.C. §1413(a)(4)(B) 18,19,21
20 U.S.C. §1413(a)(4)(B)(i) 19
20 U.S.C. §1413(a)(4)(B)(ii) 19
20 U.S.C. §1415(b)(2) 7
20 U.S.C. §1415(e)(2) 11,22,24
20 U.S.C. §1415(e)(3) 20

34 C.F.R. §300.401 11
34 C.F.R. §300.401(a)(3) 21
34 C.F.R. §300.506(a) 7

57 Fed. Reg. 44,801 (November 13, 1992)
(to be codified at 34 C.F.R. §300.7) 3

Other Authorities:

An Educator's Manual: What Educators Need to Know About Students with Traumatic Brain Injury, (R.C. Savage and G. F. Wolcott ed. 1988) 4

Brief of *Amici Curiae*, National League of Cities, et al., Argument II 9,13

Brief of *Amici Curiae*, The States of Arizona, et al., Argument II 9,13

Brief of *Amici Curiae*, National School Boards Association, et al., Argument III 9

Department of Health and Human Services, *Interagency Head Injury Task Force Report* (February 1989) 3

H. Rep. No. 332, 94th Cong. 1st Sess. (1975) 13

Petition for Writ of Cert. to U.S. Ct. of Apps. for the 4th Cir. 16

S.6, 94th Cong., 1st Sess. (1975) 12

S. 725, 103rd Cong., 1st Sess. (1993). 2

S. Rep. No. 168, 94th Cong., 1st Sess. (1975). 13,14,15,20

121 Cong. Rec. S.19485 (1975) (statement of Sen. Williams) 14

139 Cong. Rec. S.4291 (daily ed. April 1, 1993)(statement of Sen. Kennedy) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1523

FLORENCE COUNTY SCHOOL DISTRICT FOUR, *et al.*,
Petitioners,

v.

SHANNON CARTER, by and through her father and next friend, EMORY CARTER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE NATIONAL HEAD INJURY FOUNDATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The National Head Injury Foundation ("NHIF") is a national membership organization for people concerned with traumatic brain injury ("TBI"). Founded in 1980 by the mother of a young woman who had sustained traumatic brain injury, the NHIF is the only national,

non-profit membership organization dedicated solely to improving the quality of life for people with head injuries, as well as their families, friends and peers. Included among NHIF's many efforts is the promotion of head injury prevention, development of public policy, and encouragement of appropriate rehabilitation for head injury survivors.

This case demonstrates NHIF's interest in the issue before this Court because Shannon Carter arguably developed her learning disability as a result of traumatic brain injury to the head, as do many of NHIF's constituents. As the District Court below astutely noted:

> [A]ll of the experts who testified on the subject [of learning disabilities] were in agreement that, absent a traumatic injury to the head, a learning disability does not naturally develop in a child who previously did not suffer from one.

Carter v. Florence Cty. School Dist. Four, No. 4:86-2028-2 (D.S.C. Jan. 30, 1991)(Findings of Fact at f.n. 2).

More recently, on April 1, 1993, Senator Edward Kennedy introduced the Traumatic Brain Injury Act of 1993 (S. 725, 103rd Cong., 1st Sess. (1993)) from the floor of the United States Senate. Accompanying his introduction of this bill, Sen. Kennedy began his statement:

> Mr. President, today I am introducing legislation to assist the 2 million citizens who suffer traumatic head injuries each year from automobile collisions, bicycle falls, recreational accidents, assaults, and other tragic incidents.

> Each year 400,000 children suffer serious head injuries and approximately 100,000 people die, and a large number of those who survive require extensive hospitalization or suffer lifelong disabilities.

139 Cong. Rec. S.4291 (daily ed. April 1, 1993)(statement of Sen. Kennedy).

Under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§1400 *et seq.* (West 1990 ed. & Supp. 1991)("IDEA" or "Act"), the term "children with disabilities" is defined to specifically include children with traumatic brain injury. 20 U.S.C. §1401(a)(1)(A). "Traumatic brain injury," in turn, is defined in part, as follows:

> (12) 'Traumatic brain injury' means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment or both, that adversely affects a child's educational performance....

57 Fed. Reg. 44, 801 (November 13, 1992) (to be codified at 34 C.F.R. §300.7).

Additionally, a recent report published by the Interagency Head Injury Task Force also recognized traumatic brain injury as the leading killer and cause of disability in children and young adults.[1] Educators also

---

[1]Department of Health and Human Services. Interagency Head Injury Task Force Report (February 1989).

recognize that more than a million children and adolescents suffer traumatic brain injury in this nation every year.[2] The consequences of TBI are numerous. Physically, children with TBI often experience impairments of speech, vision, hearing and every form of paralysis. Cognitively, they may suffer from memory deficits, limited concentration, impaired perception and communication difficulties with reading, writing, planning and judgment. In addition to these physical and cognitive impairments, another consequence of TBI is the devastating financial impact on families of those who suffer this injury. Since the cost of providing services to children with TBI is often astronomical, many families of children with TBI are left facing near or total financial ruin.

Many of these children with TBI would not have survived their injuries had it not been for the advancements in medical technology over the past decade. As a result of such advancements, educators are now witnessing a new population of students with special needs entering or re-entering schools -- students with traumatic brain injuries. These school systems are the primary provider of long-term rehabilitation care for most children or adolescents who have sustained TBI.

Because of the high number of children and young adults affected by TBI, the considerable costs involved in educating children with TBI, as well as the significant role that school systems play in the rehabilitation of children with traumatic brain injury, the assurance of a

---

[2] An Educator's Manual: What Educators Need to Know About Students with Traumatic Brain Injury. (R. C. Savage and G. F. Wolcott ed. 1988). at page II.

"free appropriate public education," as contemplated in IDEA, is of vital interest to NHIF. NHIF, as an advocacy organization for children with traumatic brain injuries, has a direct and immediate interest in protecting these children's right to a "free appropriate public education" under the Act, and is in a unique position to bring relevant matter to the Court's attention that has not yet been addressed by the other parties in this case. It is for these reasons that NHIF is now making an appearance as *amicus curiae*.[3]

STATEMENT OF THE CASE

A complete and accurate history of this litigation is found within the Circuit Court's opinion[4] below:

> This case involves the education of Shannon Carter.... Shannon attended the first grade at Timmonsville Elementary School of Florence County School District Four, in which she resided with her parents. Shannon attended a nearby private school, the Roy Hudgens Academy, through grade six. She re-entered the public school system for the seventh grade during the 1982-83 school year.
>
> Shannon performed poorly in school during the seventh grade. As a result, the school system tested her twice in early 1983 for potential

---

[3] Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

[4] Carter v. Florence Cty. School Dist. Four, 950 F.2d 156 (4th Cir. 1991).

learning disabilities. It concluded that, although Shannon scored slightly below average in achievement, she was not learning disabled. After Shannon performed badly during the first semester of the ninth grade, her parents prompted the school district to conduct additional testing in April 1985. Based on this testing, the school psychologist concluded that Shannon was indeed learning disabled under the criteria set forth by the South Carolina State Department of Education (SDE). Although the disability went unnoticed by the school district for almost three years, the district court found that it was comparatively severe.

Following the April 1985 evaluation, the school district proposed an individualized educational program (IEP) for Shannon at a meeting on May 1, 1985. (Footnote omitted.) Under the school district's proposal, Shannon would have remained in regular classes but would have spent at least two periods per day in the resource room. Shannon's parents objected to the proposed resource room placement, believing that it would be inappropriate to place Shannon alongside students with emotional illnesses and mental retardation. Instead her parents requested a learning disabilities itinerant program in which Shannon would receive individualized attention from a special education teacher. The adopted IEP, which became effective May 2, 1985, and was to run through June 1986, placed Shannon in an itinerant program for three periods per week of individualized instruction, with the remainder of

the week in regular classes. The IEP also contained specific goals for Shannon's educational progress. It set a goal of four months of reading progress during the school year, from a level of 5.4 (i.e., fifth grade, fourth month) to one of 5.8. The mathematics goal also posited four months' progress, from a 6.4 level to a 6.8 level. The IEP was implemented for the month remaining in the 1984-85 school year.

Dissatisfied with the IEP, Shannon's parents requested a due process hearing to challenge the appropriateness of the school district's educational program. *See* 20 U.S.C. §1415(b)(2) (1988); 34 C.F.R. §300.506(a) (1991). Both the local education agency hearing officer and the state education agency hearing officer rejected the arguments of Shannon's parents and concluded that the IEP provided Shannon with a free appropriate public education.

Because of their dissatisfaction with the school district's IEP, Shannon's parents placed her for the 1985-86 school year at the Trident Academy, in Mt. Pleasant, South Carolina, where she remained until graduation in 1988. Trident is a private school that enrolls only children with learning disabilities and specializes in the education of those whose learning disabilities are severe. Although Trident is accredited by the Southern Association of Colleges and Schools, approval of Shannon's placement at Trident had never been sought from the State Department of Education.

On previous occasions, however, Trident's enrollment included students sent there by public schools under the aegis of the Act, including three who were placed there by South Carolina public schools. There is no evidence that Trident Academy had ever been disapproved for placements under the Act by the SDE.

In July 1986, Shannon's parents filed suit on her behalf in the United States District Court for the District of South Carolina. The complaint alleged that the school district breached its statutory duty to provide Shannon a free appropriate public education and sought actual damages and 'retroactive reimbursement for tuition costs so far incurred.' After a bench trial, the district court found for Shannon. Although concluding that the school district had not breached the procedural requirements of the Act, it held that the school district violated the Act's substantive provisions by failing to provide Shannon with a free appropriate public education. The court concluded that the IEP's goals of a mere four months' progress in mathematics and reading allowed Shannon to 'continue to fall behind her classmates at an alarming rate' and therefore 'ensured the program's inadequacy from its inception.' The district court also found itinerant study of only three periods per week inadequate to 'allow her to receive passing marks and advance from grade to grade.'

Turning to the question of reimbursement, the district court held that 'Trident Academy

provided Shannon an excellent education in substantial compliance with all the substantive requirements of the (Act).' The court relied on the testimony of a court-appointed expert who tested Shannon and concluded that she made significant progress at Trident. For example, Shannon's reading comprehensive advanced from a level of 4.7 in 1985 to 7.8 in 1988 -- more than three years' progress over three school years. Moreover, the court concluded that '[n]othing in the existing law or regulations' barred reimbursement simply because the State Department of Education had not approved Shannon's placement by her parents at the Trident Academy. Thus, the district court ordered the school district to reimburse Shannon

> for tuition and fees, room and board, mileage to school, and four trips home per year for each of her three years at Trident ... plus prejudgment interest.

The school district appealed the judgment of the District Court to the Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the judgment of the District Court.

STATUTORY SCHEME AND SUMMARY OF ARGUMENT

This case presents a question of statutory interpretation only, **not** a question of public policy as suggested by several *amici curiae*. *See Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 177 (1982); *and* Briefs of *Amici Curiae*, National League of Cities, et al., Argument II, page 21; The States of Arizona, et al., Argument II, at page 22; National School Boards

Association, et al., Argument III, page 27. By enacting IDEA (formerly the Education of the Handicapped Act) in 1975, Congress mandated this Nation's public policy dealing with the education of handicapped children (now referred to as "children with disabilities") as one assuring that **all** children with disabilities have available to them "a free appropriate public education" which emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. §1400(c).

This Act's legislative history clearly establishes Congress' admirable vision to insure children with disabilities access to a free appropriate **public-supported** education designed to meet their unique needs, rather than to guarantee them any particular form of education once access is attained. Additionally, Congress sought to help states and localities provide for the education of all children with disabilities by offering financial assistance to states, in exchange for the states' agreement to comply with federally mandated standards and procedures. 20 U.S.C. §§1411-1415, 1420. To qualify for this federal financial assistance under IDEA, a state must demonstrate that it has "in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. §1412(1). This policy must be reflected in a state plan, approved by the Secretary of Education, that describes the goals, programs and timetables under which the state intends to educate children with disabilities within its jurisdiction. 20 U.S.C. §§1412, 1413.

Additionally, 20 U.S.C. §1412(5)(B) only requires private placements to meet state educational standards for children with disabilities whose needs cannot be met by their local educational agency, when the placement is

made by the state or local educational agency ("SEA/LEA"). Consistent with this statutory scheme, federal regulations regarding state educational standards only apply to private schools when the child is placed there by the SEA/LEA. *See* 34 C.F.R. §300.401. This scheme has no application to unilateral parental placements; it only applies to placements made by state and local school districts as part of their statutory obligation.

This Act, at §1415(e)(2), also gives federal courts the authority to grant appropriate relief, which relief includes "a broad grant of equitable power designed to provide courts maximum flexibility in effectuating the statutory objectives." *Doe v. Brookline School Committee*, 722 F.2d 910, 919 (1st Cir. 1983). Given the remedial nature of the Act, there is nothing within this section limiting the availability of appropriate financial relief to those parents placing their child in a private school which meets state education standards. To the contrary, financial relief is available even to those parents placing their child in a private facility that does **not** meet state education standards. As the Circuit Court below noted: "The Act itself simply imposes no requirement that the private school be approved by the state in parent-placement reimbursement cases," nor is there any indication to the contrary in the Act's legislative history. *Carter v. Florence Cty. School Dist. Four*, 950 F.2d 156, 162 (4th Cir. 1991).

ARGUMENT

I. THE LEGISLATIVE HISTORY BEHIND IDEA CLEARLY ESTABLISHES THAT BY ENACTING THIS ACT, CONGRESS INTENDED ITS

OVERRIDING PURPOSE AS ONE OF PUBLIC SUPPORT FOR SPECIAL EDUCATION AND RELATED SERVICES TO CHILDREN WITH DISABILITIES.

IDEA's "evolution and major provisions shed light on the question of statutory interpretation which is at the heart of this case." *Rowley*, 458 U.S. at 179. Contextually, at the heart of this evolutionary process is IDEA's legislative history. In 1975, when Congress had this Act under consideration, the Senate Subcommittee on the Handicapped heard extensive testimony at several on-site locations. Many of the states that have now appeared as *amici curiae* in the present case testified at those on-site hearings. The Senate Committee on Labor and Public Welfare, to which was referred the Senate version of this bill (S.6, 94th Cong., 1st Sess. (1975)), summarized the testimony as:

> The views presented in this testimony have been carefully reviewed and provide the basis for the changes made by the Committee in this legislation. These individuals and organizations were **generally unanimous** in their testimony on the following points: (1) support for the basic thrust of S.6; (2) recognition of the need for a final date in legislation by which time all handicapped children are to be provided a free appropriate public education; (3) **support for Federal assistance to assure that the rights of handicapped children are protected**; and (4) awareness of the need for expansion of Federal assistance and responsibility in the area of education for handicapped children. (Emphasis added.)

S. Rep. No. 168, 94th Cong., 1st Sess., page 7 (1975).

Now, before this Court come 17 individual states, the National League of Cities and the Council of State Governments, all protesting that the Circuit Court's opinion below "impermissibly encroaches on state and local authority over the education of children with disabilities" (Brief of *Amici Curiae* National League of Cities, et al., Argument II, page 21), and that it "impairs their ability to provide free appropriate public education as required by the IDEA." (Brief of *Amici Curiae* The States of Arizona, et al., Argument II, page 22.) Despite these protests, this Court has previously recognized in *Honig v. Doe*, 484 U.S. 305 (1988), at page 323, that:

> We think it clear, however, that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.

Both the Senate and House Reports (S. Rep. No. 94-168, and H. Rep. No. 332, 94th Cong. 1st Sess. (1975)) recognized various court decisions in 27 states and the District of Columbia as shedding light on the need for federal involvement. *See* S. Rep. No. 94-168, page 6. Of particular interest to Congress was the case of *Mills v. Board of Educ. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972). In its report, the Senate quoted portions of Judge Waddy's Memorandum Opinion, Judgment and Decree from *Mills*, as follows:

> The defendants are required by the Constitution of the United States, the District of Columbia Code and their own regulations to provide a

> publicly-supported education for these 'exceptional' children. Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education, and their failure to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds.... [T]he District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. (Emphasis added.)

Mills, id. at 876. *See also* S. Rep. No. 94-168, page 23; and 121 Cong. Rec. S.19485 (1975)(statement of Sen. Williams).

By employing the phrase "publicly-supported," Judge Waddy captured the spirit of the then yet to be enacted Education of the Handicapped Act, now known as IDEA; that is, the emphasis for appropriate education is premised upon **public-support** (i.e., financial), not exclusively upon public facilities nor necessarily even upon public standards. To implement his mandate, Judge Waddy ordered the school board, as one form of relief, to issue **public-supported** tuition grants at private schools if the Board could not supply the appropriate public education within its own system. *See Mills, id.* at 878.

The Senate Committee on Labor and Public Welfare mirrored Judge Waddy's mandate when it found that:

> Furthermore, while the Committee has provided that the State educational agency is to be the final responsible authority for assuring that all

> handicapped children have available to them free appropriate public education, it does not intend that State and local education agencies must be the sole providers of such services. (Emphasis added.)

S. Rep. No. 94-168, page 22.

This mandate was incorporated into the definition of "free appropriate public education" (FAPE) to include special education and related services that have been provided at "public expense" and "without charge." 20 U.S.C. §1401(a)(18)(A). Clearly, Congress intended to furnish children having disabilities a special education at public expense and without charge, with "the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the child." *Rowley*, 458 U.S. at 200. Although the Act provides that FAPE meet the "standards of the state education agency" (20 U.S.C. §1401(a)(18)(B)), Congress nevertheless intended that the **substance** of the education override its **form**, except in the situation (not present here) where the school system makes the placement.

However, when the parents or guardian make the placement, emphasizing form over substance would often put them in the situation where they must resort to distant, even out-of-state, placements -- placements which should only be employed as a last resort when dealing with a child with a disability. From the outset, parents have available to them only a limited pool of educational facilities because many private schools are reluctant to accept children with disabilities. Private schools, even those that meet state standards, have no obligation to accept children with disabilities and

apparently, many of them refuse to accept these children. *See Antkowiak by Antkowiak v. Ambach*, 838 F. 2d 635 (2nd Cir. 1988) and *Diamond v. McKenzie*, 602 F. Supp. 632 (1985). If this Court were to accept petitioners' argument imposing the state standard burden upon parents who place their children in private schools, then the number of facilities available to them within their own community would be reduced even further.

A reduction in the number of available schools would necessarily result in placements that are not within the child's own community, indeed in many instances, even out-of-state. Community-based placements are more proper and should be sought because they promote the engendering of emotional support that parents can provide to their children with disabilities. This emotional support can only be obtained through close personal contact when the parent and child reside in close proximity to one another. However, this emotional support is lost in the distant placement.

In fact, the record in this case demonstrates that Shannon Carter's parents sought to avoid a distant placement of their daughter throughout her educational history. They first placed Shannon in an elementary school located in a neighboring county so that she could "'be with the children that she was with in [her] community, at church.'" Petition for Writ of Cert. to the U.S. Ct. of Apps. for the 4th Cir., page 5 (quoting JA48). Then, by placing Shannon at Trident Academy for her secondary education, her parents once again sought the closest available facility. *See* Petition for Writ of Cert., id. at 9. Adopting petitioners' argument would have required Shannon's parents to place her in a more distant

school. Clearly, Congress could not have intended such a result.

Furthermore, when the parents or guardian make the placement, emphasizing form over substance would often put them in the proverbial "Catch-22" where they must compromise the quality of their child's education for the sake of formal state standards that may have no relation to the appropriateness of the education. This case presents a perfect example of the problems that such misplaced emphasis would cause, because here, the petitioners do not contest the **appropriateness** of Shannon's education[5]. Instead, petitioners argue that Shannon's parents are not entitled to reimbursement solely because Trident Academy, the school that so appropriately educated her, did not meet all of the state's formal standards, even though other South Carolina public schools had previously placed children there. Indeed, no evidence was presented that the South Carolina Department of Education had ever disapproved any placements at Trident. *See Carter*, 950 F.2d at 159. Without question, if the parents or guardian make the placement, then Congress did not intend form to override substance when such a requirement adversely affects the one whom the Act seeks to protect--the child with a disability.

II. THE LEGISLATIVE HISTORY BEHIND IDEA, AS WELL AS THE LANGUAGE FOUND WITHIN THE ACT ITSELF, CLEARLY ESTABLISHES

---

[5]As noted by the Circuit Court below, "the [petitioner] school district did not dispute the district court's conclusion that Trident Academy provided Shannon with an appropriate education...." Carter, 950 F.2d at 161 n.2.

THAT CONGRESS INTENDED A SECTION 1413(a)(4)(B) PLACEMENT TO MEET STATE STANDARDS ONLY WHEN THE PLACEMENT IS MADE BY PUBLIC SCHOOL AUTHORITIES, NOT WHEN THE PLACEMENT IS UNILATERALLY MADE BY THE PARENTS OR GUARDIAN OF THE CHILD WITH THE DISABILITY.

The District and Circuit courts below were presented with the narrow question of whether, after determining that petitioners failed to meet their statutory obligation under the Act to provide Shannon Carter with a "free appropriate public education," the Act required petitioners to reimburse respondents for the cost of Shannon's education in a private school unilaterally chosen by her parents that did not meet the standards of the State educational agency under Section 1401(a)(18)(B) of the Act, but that did provide Shannon with an appropriate education. In two well-reasoned opinions, the District and Circuit courts below addressed this argument by reconciling surface inconsistencies in language from a general section of the Act (20 U.S.C. §1401(a)(18)), with that of a specific section dealing with placement in private schools (20 U.S.C. §1413(a)(4)(B)), arriving at a result calculated to promote the legislative purpose behind the Act.

In dispelling petitioners' argument that reimbursement is proper only when the parents or guardian place their child in a private school approved by the state, the Circuit Court below properly found that the school district's position regarding Section 1413(a)(4)(B) would create "a significant and unwarranted restriction upon the ability of otherwise eligible children to seek

relief." *Carter*, 950 F.2d, at 163. This section requires that a state submit a plan to the Secretary of Education which shall set forth policies and procedures to assure that in private school placements, "if such children are placed in or referred to such schools or facilities by the State or appropriate local education agency ... in all such instances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies...." 20 U.S.C. §1413(a)(4)(B)(i) and (ii).

The Circuit Court below properly found that "Congress clearly envisioned that §1413(a)(4)(B), and its requirement that private schools receiving funds under the Act meet state educational standards, would apply only when the child is placed in the private school by the state or local school system." *Carter, id.* at 162. The Act imposes no such requirement when the child is so placed by the parents or guardian, nor does the Act's legislative history indicate that Congress ever intended to place these burdens upon the parents or guardian when they make the placement. Again, the legislative history provides:

> Thus, the bill requires that if a State or local educational agency has placed or referred the child to a private school or to another school or facility inside or outside of the State or local jurisdiction because the State or local educational agency did not have an appropriate program for the child, then the State or local educational agency remains financially responsible for that child's education.
>
> . . .

> Under the Committee bill a State's application shall provide that special education and related services shall be provided at no cost to the parents of a handicapped child.... It should be emphasized, however, that in no case should such charges result in cost to the parents or guardian, or the denial or diminution of services to the child.

S. Rep. No. 94-168, page 32.

The intent of Congress to place certain burdens only upon school authorities and not upon the parents or guardian of a child with a disability is evidenced in other sections of the Act as well. For example, portions of the Act mandate that the SEA/LEA educate children with disabilities in the least restrictive environment, which is often termed "mainstreaming." There is no such mandate for the parents or guardian. *See* 20 U.S.C. §1412(5)(B). In other areas, the Act requires the SEA/LEA to leave a child in a current educational placement during the pendency of procedural hearings under the Act, which is often referred to as a "stay-put" requirement. Again, there is no equivalent "stay-put" requirement imposed upon the parent or guardian. *See* 20 U.S.C. §1415(e)(3). *See also, Honig v. Doe*, 408 U.S. 305, 324 (1988). Congress clearly intended to impose more stringent requirements upon state agencies than upon parents and guardians under the terms of the Act, for the simple reason that the child with a disability needs more protection from the state than from his or her own parents or guardian.

This same intent of Congress to impose different burdens upon state agencies is also incorporated into the Secretary of Education's own regulations:

> Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:
> (a) Is provided special education and related services:
> (1) ...
> (3) at a school or facility which meets the standards that apply to State and local educational agencies.... (Emphasis added.)

34 C.F.R. §300.401(a)(3).

The Secretary's regulations impose no such obligation when the parent or guardian makes the placement. These mandates **only** apply to the SEA/LEA -- **not** to the parents or guardian. Similarly, the state standards provision of 20 U.S.C. §§1401(a)(18)(B) and 1413(a)(4)(B) should mandate only to the SEA/LEA -- not to the parents or guardian.

This language from the legislative history, from the Act itself, as well as that reflected in the Secretary's own regulations, clearly establishes Congress' intent to make the child (as well as the parents and guardian) the beneficiary of the Act, and to make the SEA/LEA the obligators. Congress did not intend "to impose on private schools chosen by parents the whole panoply of duties that the Act imposes on the state" *Carter, id.* at 163, simply because the threats that are present when the

government makes a private placement are not present when the parent or guardian makes such a placement.

III. WHEN STATE EDUCATION AUTHORITIES FAIL TO SATISFY THEIR STATUTORY OBLIGATION TO PROVIDE A CHILD WITH A DISABILITY AN APPROPRIATE EDUCATION, THE REMEDIAL LANGUAGE FOUND WITHIN SECTION 1415(e)(2) OF IDEA, WHICH CONFERS BROAD EQUITABLE AUTHORITY UPON COURTS TO GRANT APPROPRIATE RELIEF, CLEARLY ESTABLISHES CONGRESS' INTENT TO HAVE THE PARENTS OR GUARDIAN OF SUCH A CHILD REIMBURSED FOR THE COSTS OF A SPECIAL EDUCATION AND RELATED SERVICES IN A PRIVATE SCHOOL UNILATERALLY CHOSEN BY THEM, EVEN THOUGH THE PRIVATE SCHOOL DOES NOT MEET THE STANDARDS OF THE STATE EDUCATION AGENCY, BUT OTHERWISE ADDRESSES THE CHILD'S UNIQUE NEEDS AND PROVIDES THE CHILD WITH AN APPROPRIATE EDUCATION.

Congress also expressed its intent to maximize the benefits from "free appropriate public education" when it enacted 20 U.S.C. §1415(e)(2) of the Act. This section confers upon federal courts "a broad grant of equitable power designed to provide courts **maximum flexibility** in effectuating the statutory objectives." *Doe v. Brookline School Comm.*, 722 F.2d 910, 919 (1st Cir. 1983). (Emphasis added.) As this Court recognized in *Burlington School Comm. v. Massachusetts Dept. of Ed.*, 471 U.S. 359, 369 (1985): "[t]he ordinary meaning of these words confers broad discretion on the court." This express

language conferring broad equitable powers, combined with the overall remedial nature of the Act, grants broad discretion upon a court to fashion any remedy that is "compatible with sound and established equitable principles." *Hall v. Cole*, 412 U.S. 1, 12 (1973). *Also see Doe, id.* at 919. In the case of *California v. American Stores Co.*, 495 U.S. 271 (1990), this Court stated, at page 295:

> More recently, in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), we observed that when Congress endows the federal courts with equitable jurisdiction, Congress acts aware of this longstanding tradition of flexibility. "'Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" *Ibid*, quoting *Porter v. Warner Holding Co.* 328 U.S. 395, 398 (1946).

Recognition and application of this Court's jurisdiction requires, therefore, the advancement of IDEA's purpose by **not** conditioning reimbursement upon state approval of the private school in a placement made by the parents or guardian when the state educational agency fails to meet its statutory obligation to provide the child with a disability an appropriate education. The Circuit Court below properly found that "[c]onditioning reimbursement under *Burlington* on state approval of the private school would undermine the values and policies the Act was enacted to further." *Carter*, 950 F.2d at 164. IDEA's purpose, as well as its values and policies, is "to assure that all children with disabilities have available to them ... a free appropriate public education which

emphasizes special education and related services designed to meet their unique needs...." 20 U.S.C. Section 1400(c).

When the parents or guardian of a child with a disability unilaterally place their child in a private school, then this Court's **proper placement** test developed in *Burlington* follows the **unique needs** language found at Section 1400(c) of the Act. The state standard requirement that petitioners argue does not. When school authorities fail to meet their statutory obligation to provide a child with a disability an appropriate education, and the parents or guardian must unilaterally place their children in private schools, then reimbursement should be premised upon recognizing the child's unique needs and proper placement -- not upon formal state standards which have failed the child in the first place. This Court in *Burlington* questioned "whether this grant of authority [in 20 U.S.C. §1415(e)(2)] includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." *Burlington, id.* at 369. In that case, this Court answered the question in the affirmative. Once again, this Court should answer the question affirmatively. Nothing in IDEA suggests an answer to the contrary.

CONCLUSION

In an ideal setting, IDEA generally provides that the primary source of special education for children with disabilities should be the public school authorities. However, when these authorities fall short of this ideal and fail to meet their statutory obligations to assure that

these children obtain a "free appropriate public education," then their parents or guardian are left with no alternative but to find an appropriate education through a proper placement in the private sector. This is the situation which confronted Shannon's parents.

In this situation, it is inconsistent with IDEA's purpose and its underlying values and policies, as well as the intent of Congress, to prohibit the parents from educating their child with a disability at a private school which provides an appropriate education merely because it does not satisfy the public school system's format -- the same format that initially placed the child in this precarious situation. Under these circumstances, satisfying state standards should not be made a prerequisite for a *Burlington* **proper placement.** Therefore, this *Amicus Curiae* respectfully asks that the Judgment of the Circuit Court below should be affirmed.

Respectfully submitted,

CRAIG DENMEAD
(Counsel of Record)
KEVIN M. MALONEY
DEBORAH A. BONARRIGO
DENMEAD & MALONEY
37 West Broad Street
Suite 1150
Columbus, Ohio 43215-4189
(614) 228-5271
Counsel for Amicus Curiae

Supreme Court, U.S.
FILED
APR 29 1993
OFFICE OF THE CLERK

No. 91-1523

In the

Supreme Court of the United States

October Term, 1992

Florence County School District Four, et al.,

Petitioners,

v.

Shannon Carter, By and Through Her Father and Next Friend, Emory Carter,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION AND THE NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION IN SUPPORT OF PETITIONERS

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association (NSBA)
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	2
STATEMENT OF THE CASE	4
ARGUMENT	
Introduction	4
I. The decision below ignores both the requirements of the Act and this Court's decision in Hendrick Hudson v. Rowley and the court substitutes its own eduational standards for that of the State	7
A. "Free appropriate public education" (FAPE) is defined in the Act rather than by decisions of lower courts	8
B. It is not the role of the courts in reviewing FAPE, to substitute their own judgment for that of education officials.	17
II. School districts are obligated under the IDEA to pay the costs of private schooling for disabled students only where the students are placed in the school for the purpose of compliance with the IDEA	22
III. Education of disabled students in a private residential placement is substantially more expensive than education in other placements and public funds should not be expended for private placements unless the	

placement is in accordance with the IDEA 27

Conclusion 31

TABLE OF AUTHORITIES

CASES: **PAGE**

Burlington School Committee v. Department of Educ. of Mass., 471 U.S. 359 (1985) 4,15,25

Carter v. Florence County School Dist. Four, (D.S.C.) Petition for Certiorari 29a 21

Florence County School Dist. Four v. Carter, (4th Cir.) Petition for Certiorari page 11a 11

Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176 (1992) . . . passim

Honig v. Doe, 484 U.S. 305 (1988) 15

STATUTES:

20 U.S.C. § 1401 et seq. . . . . passim

OTHER AUTHORITIES:

34 C.F.R. 300.15 12

Appendix A, U.S. Department of Education Regulation Implementing Part B of the Education of the Handicapped Act, 42 Fed. Reg. 42, 504 (Aug. 23, 1977) 13,24

Robinson, Glen E. and Protheroe, Nancy J. Protheroe, Cost of Education Education Research Service 30

U.S. Department of Education, Eleventh Annual Report to Congress on the Implementation of the Education of the Handicapped Act (1989) 27

U. S. Department of Education, Justification of Appropriation Estimates to the Congress Fiscal Year 1993, F-19 (1992) 28

Jerry R. Parkingson, Private School Placement of a Disabled Child in an Unapproved School: A "Free Appropriate Public Education"?, 76 Educ. L. Rep. 893 (1993) 7

Statement of the Ad Hoc Coalition to Increase Federal Funding for the Education of Children with Disabilities, Spring, 1992 29

Survey of National Association of State Directors of Special Education . . 29

U.S. Department of Education, Thirteenth Annual Report to Congress on the Implementation of the Education of the Handicapped Act (1991) 16

No. 91-1523

In the

Supreme Court of the United States

October Term, 1992

Florence County School District Four, et al.,

Petitioners,

v.

Shannon Carter, By and Through Her Father and Next Friend, Emory Carter,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION AND NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION IN SUPPORT OF PETITIONERS

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

INTEREST OF THE AMICI

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

Each of the approximately 16,000 school districts which NSBA represents receives or is eligible to receive financial assistance under the Individuals with Disabilities Education Act, 20 U.S.C. § 1401 et seq. (hereinafter designated as IDEA or the Act). The subject of this case is of great importance to school districts across the country from both an educational and financial perspective.

The National Association of State Boards of Education (NASBE) is a nonprofit, private organization representing state and territorial boards of education in national issues and assists the boards in the fulfillment of their duties.

NASBE's objectives are to promote excellence in the education of all students and equality of access to educational opportunity; to strengthen leadership in education policy making and to assure responsible lay governance of public education.

NASBE's interest in this case is the integrity of the state standards for approval of private schools providing special education. These procedural and substantive standards are adopted by state boards of education to protect the educational welfare of children. A public school cannot place a child in a private school unless the school is approved as meeting the state standards. If

the decision of the Court of Appeals for the Fourth Circuit is upheld it would eliminate any requirement or incentive for private schools to comply with state standards if the child is placed in the private school by a parent, rather than a school district.

NASBE is committed to quality education for all children and believes allowing state reimbursement for parental placement of children in nonstandard private schools would not be in the best educational interests of children with special needs.

STATEMENT OF THE CASE

Amici incorporates by reference thereto the statement of the case contained in brief filed herein by Petitioners.

ARGUMENT

Introduction

The court below correctly stated that this Court held in Burlington School Committee v. Department of Educ. of Massachusetts, 471 U.S. 359 (1985), that a parent who

unilaterally places a child in a private school has a right to reimbursement of the expenses of the school if the public placement was inappropriate and the private placement was appropriate. The lower court, however, ignored the standards set by Congress and this Court for determining what is appropriate in favor of the lower court's own standard. It has, therefore, disregarded the fact that the private school does not meet the state's educational standards.

Congress has designated the states as the enforcement officers for the IDEA to assure that all children with disabilities in their respective states are provided a "free appropriate public education" (FAPE). State standards provide an objective baseline from which determinations can be made as to whether a specific placement provides a free appropriate public education to an individual child. However, a school which does not meet state standards developed pursuant to the IDEA

falls below this baseline and therefore cannot meet the IDEA requirement of a "free appropriate public education."

Not only is Petitioner not required to reimburse Respondents for the expenses of an education that does not meet state education requirements, and thus does not meet the requirements of the IDEA, Petitioner is prohibited from using IDEA funds for that purpose.

A recent commentary on the decision below provides an excellent summary of its problematic nature.

> [The placement of Shannon by her parents in an unapproved private school] not only runs afoul of the specific language of the IDEA, it also raises issues of basic fairness with respect to the public school district's financial responsibility. Moreover, the ultimate goal of the IDEA -- providing an appropriate educational experience for disabled children -- is at risk if state educational standards are disregarded. . .
>
> Burlington attempted to accommodate the interests of all concerned parties -- parents, children, and public school officials -- in its decision to uphold reimbursement for parents' unilateral private school placements. The courts should draw the line at state-approved private schools, particularly if parents and school officials are to be encouraged to work together in a cooperative effort.

Parkingson, J., Private School Placement of a Disabled Child in an Unapproved Private School: A "Free Appropriate Public Education"?, 76 Educ. L. Rep. 893, 911-912 (1993).

I. The decision below ignores both the requirements of the Act and this Court's decision in Hendrick Hudson v. Rowley and substitutes its own educational standards for that of the State.

In 1982 this Court handed down its first decision interpreting the IDEA (then known as the Education for All Handicapped Children Act). Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). In ruling against the plaintiffs who sought a sign language interpreter for their deaf child who was currently being educated in the regular classroom through the use of a hearing aid,

the Court considered two questions: "What is meant by the Act's requirement of a 'free appropriate public education?' And what is the role of state and federal courts in exercising the review granted by 20 U.S.C. 1415?" 458 U.S. at 186. The Court's answers to those questions confirm that the decision below is both educationally unsound and legally insupportable.

A. "Free appropriate public education" (FAPE) is defined in the Act rather than by decisions of lower courts.

In Rowley this Court disagreed with the plaintiff who argued that the Act provides no workable guidance in defining "free appropriate public education" (FAPE), thereby freeing the courts to make that decision. The Court also criticized the dissent which would "give the courts carte blanche to impose upon the States whatever burden their various judgments indicate should be imposed." 458 U.S. at 190 n. 11. Although Congress provided highly specific procedural safeguards in the

Act in contrast to the somewhat imprecise substantive standards, the Court noted that Congress did indeed provide guidance on the meaning of FAPE through its definition of the term.

> It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define "free appropriate public education":
>
> "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program [known as the IEP] required under section 1414(a)(5) of this title."

Id at 187-88 (Court's emphasis). The Court pointed out that nothing in the Act evidences a Congressional intent to develop a substantive standard. The emphasis is on process, with the State being required to adopt procedures to assure that each disabled

child receives individualized consideration and instruction. After approval by the U.S. Department of Education, those rules and procedures are imposed by the State on the local educational agencies.

The lower court in the case at bar, however, ignored the entire procedural scheme of the Act, apparently deeming it irrelevant to a consideration of whether Shannon was provided FAPE through her enrollment in Trident Academy. The lower court admitted that two of the four components of Congress' definition of FAPE were missing at Trident Academy, i.e., subparagraph (B)'s condition that the education meet state standards and subparagraph (D)'s condition that the education be provided in accordance with the provisions of the child's IEP. The court casually noted that the school district followed all of the procedural requirements of the Act and that Trident "does not attempt to comply with the terms of the Act," but the

court apparently deemed those facts unimportant. Florence County School Dist. Four v. Carter, (4th Cir.), Petition for Certiorari at 11a. In its discussion of the definition of FAPE, this Court stated:

> Almost as a checklist for adequacy [of FAPE] under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels under the State's regular education, and comport with the child's IEP.

458 U.S. at 189. This Court reiterated the list quoted above in its discussion of what the state must do to satisfy the FAPE requirement. Id. at 201.

In addition to the definitional requirements of FAPE, the Court also discussed Congress' acknowledgement of the importance of training and use of experts in assuring that each child is provided FAPE. For example, the Court cited the Act's requirement that States create an advisory committee of experts in the

field to comment on state rules and regulation under the Act. Id. at 209, n.31. Yet the court below held that it is irrelevant to a claim for reimbursement that Trident Academy does not attempt to follow those rules and regulations.

This is not a case of a minor violation of some aspect of IDEA's procedural safeguards, which would not necessarily call into question the appropriateness of the educational program of a child. Nor is this a situation where a school, which is in substantial compliance with state standards and is subject to state monitoring, violates a minor aspect of state standards. What we have here is not a mere technical violation of state standards. Parents are asking for reimbursement of tuition and costs for an educational program that does not even come close to meeting the requirements of the IDEA. Respondents do not dispute that Trident does

not attempt to follow IDEA procedures in any respect.

Trident has made no attempt to comply with state standards even in some of the most important areas such as teacher certification. This Court in Rowley cited legislative history of the Act stating that "handicapped children . . . are denied access to public schools because of a lack of trained personnel." 458 U.S. at 191, n.13. The Act addresses that concern through its requirement that state plans include a "comprehensive system of personnel development." 20 U.S.C. § 1413(a)(3).

The U.S. Department of Education's original discussion of the requirement in Appendix A to its regulations under the Act states:

> The statute is very clear in requiring that a "comprehensive system of personnel development" be implemented in each State. Since this is a broad requirement, challenging each State to reach out to the expansive community of

> agencies involved in preparing personnel to educate the handicapped, many of which are private and not under the control of the State, it was felt that a regulation was needed that would provide sufficient information for the State and involved agencies to understand their responsibilities in achieving compliance.

42 Fed. Reg. 42, 509 (Aug. 23, 1977). 34 C.F.R. 300.381 requires that state plans describe the personnel development system which must include "procedures and activities a State will undertake to insure an adequate supply of qualified personnel. . ." 34 C.F.R. 300.15 defines the circumstances under which a person is deemed to be "qualified" as those individuals who have "met State educational agency approved or recognized certification, licensing, registration or other comparable requirements that apply to the area in which he or she is providing special education or related services." This provision is consistent with the Act which also calls for

establishment of state standards for special education personnel. 20 U.S.C. § 1413(a)(14).

The State of South Carolina adopted a comprehensive system of personnel development which was approved by the U.S. Department of Education as meeting the requirements of IDEA. Yet the lower court in the case at bar deemed it irrelevant that at least one of Shannon's teachers was not certified under the rules and regulations of the state.

Trident's failure to meet FAPE requirements even extends to failure to provide IEPs. The IEP requirement which is also included in the Act's definition of FAPE has been described by this Court as the "centerpiece of the statute's education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 311 (1988). In Burlington the Court characterized the IEP as the "modus operandi" of the Act. Yet the lower court in this case held that Trident's failure to develop IEPs for its students is of

no consequence in determining liability of the school district for reimbursement.

Respondents' request for reimbursement is made pursuant to the IDEA. The funds for the reimbursement would be paid in part out of the proceeds of grants made under the IDEA. Yet the lower court reached the bizarre conclusion that failure to comply with Congress' conditions of the grant is "not fatal to the request for reimbursement."

Congress placed on the states the responsibility to monitor compliance with IDEA. Yet the State in this case has not had the opportunity to monitor Trident's educational program. The U.S. Department of Education financed a recent national study of separate day and residential facilities that serve children with disabilities. U. S. Department of Education, Thirteenth Annual Report to Congress on the Implementation of The Individuals with Disabilities Education Act (1991) 86. The study found that state

compliance monitoring is one of the best methods available to States to determine educational program effectiveness and developing training and technical assistance to upgrade educational programs for children with disabilities. In this case, no such monitoring took place. The school district cannot be expected to pay for the education of a child in a school over which neither it nor the State had jurisdiction to monitor compliance -- even if a court, using its own educational standards, determines after the fact that the education received by the child was "appropriate."

B. It is not the role of the courts in reviewing FAPE, to substitute their own judgment for that of education officials.

The second question addressed by the Court in Rowley relates to the role of lower courts in reviewing the actions of the state or the school district. The lower court's

holding also fails to meet the standards set by this Court in this regard.

> [T]he provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought.

458 U.S. at 207.

The lower court, in effect, has "certified" Trident as an appropriate placement under the Act, through the application of its own educational standards. The lower court has cavalierly awarded reimbursement to Respondents out of funds appropriated by Congress, while totally ignoring the conditions placed by Congress on that appropriation.

The lower court noted that the educational program at Trident "in many ways

parallels" what is required by the IDEA. That is an educational determination. In a given case, state educational experts might decide that a private school's program is educationally sufficient to meet state standards even though certain technicalities are not met, but that is the role of the educators, not the courts. For example, the lower court noted that at least one of Shannon's teachers does not meet South Carolina's certification requirements. If that fact is educationally irrelevant, that is a decision to be made by educators, not courts.

The lower court cited Rowley for the proposition that the education is "appropriate" if it is "reasonably calculated to enable the child to receive educational benefits." If that was all that Congress or this Court intended to require, the Act would have been a paragraph long instead of containing "elaborate and highly specific,"

requirements as to the process for developing and implementing education programs for children with disabilities. Rowley, 458 U.S. 205. Educational benefit is only half of what this Court deemed in Rowley to be the proper inquiry of a court:

> Therefore, a court's inquiry is twofold. First, has the State complied with the procedures set forth in the Act? And second is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Id. at 207. Furthermore, since an IEP was not developed for Shannon, even the second half of this analysis cannot have been met since "educational benefit" is determined by examining the IEP.

The lower court apparently believes that if a school district fails to provide FAPE then "all bets are off." The parents are free to enroll their child in any school they want without restriction on either the parents or the school. Presumably, a child could even be

placed in a "home school" under the lower court's analysis, and the school district could be held liable for the reasonable costs of education at home. Under the lower court's reworking of the Act, if a court later determines, by applying educational standards developed by the court and through the use of court appointed experts, that the private school provided the child an "appropriate" special education, the public school must reimburse the parents for expenses. Carter v. Florence County School Dist. Four, (D.S.C.) Pet. for Cert. Appendix 29a. This is a dangerous precedent which is not educationally sound.

The IDEA was designed to assure access to publicly financed education. It was not designed to mandate that public school districts finance the education that the parents of a child with a disability and the courts deem is best for the child without regard for compliance with state education

standards. That standard was expressly rejected by this Court in Rowley.

> Congress' desire to provide specialized educational service, even in furtherance of "equality," cannot be read as imposing any particular substantive educational standard upon the States.
>
> The [lower courts] erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children . . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

458 U.S. at 200-201.

II. School districts are obligated under the IDEA to pay the costs of private schooling for disabled students only where the students are placed in the school for the purpose of compliance with the IDEA.

Although the IDEA requires school districts to provide services to all students with disabilities who are enrolled in private schools, the extent of the obligation depends on the reason the child is enrolled in the

school. Where the parents place the child in a private school for their own reasons, the obligation extends only to allowing the child to participate in the special education program of the school district.

20 U.S.C. § 1413(a)(4)(A) provides that the plans which the Act requires to be developed by all states participating in the funding program, must set forth policies and procedures to assure:

> that to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under the subchapter by providing for such children special education and related services.

Under this provision, the school district must make special education available to the child on the premises of either the public or private school (in cases involving religious schools the latter option may not be available), but it is not required to pay the

tuition or other costs of the private school.

> If [the parents choose to place their child in a private school rather than take advantage of the free public education] the Act does not require the State or local educational agency to bear the cost of the private school. For children placed in private schools by their parents, the State and its local educational agencies have a different duty. They must design their program so that handicapped children in those private schools can participate in special education and related services offered by the local educational agencies if the parents of those children so desire.

Appendix A to U.S. Department of Education Regulations Implementing Part B of the Education of the Handicapped Act, 42 Fed. Reg. 42, 510 (Aug. 23, 1977).

20 U.S.C. § 1413(a)(4)(B) provides that where the child is placed in or referred to the private school "by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter," expenses of the private school must be paid by the state or school district. This is the only provision under which parents

would be entitled to reimbursement for private school tuition and costs. Shannon was not "placed in or referred" to Trident. However, since the lower court held that the public school placement was "inappropriate"[1], Shannon's parents were allegedly forced to enroll her in a private school in order to receive FAPE. In accordance with this Court's decision in Burlington, where the public placement is inappropriate, the parents may place the child in a private school as the means of carrying out the terms of the Act and that placement will be treated in the same manner as if the school district had placed the child in the school. Since the school district is not eligible for funding under the

---

[1] This Court agreed to review only the second issue presented in the petition for certiorari. Had the Court granted review on the other issue, Amicus would have expressed its strong disagreement with the holding below in which the court substituted its own judgment for the judgment of the educational experts regarding the appropriateness of educational goals set for Shannon. Amicus respectfully requests this Court to state in its decision that it does not necessarily agree with the lower court's decision as to the appropriateness of the public placement.

IDEA where the education provided is not in compliance with the requirement of the Act, similarly, parents are also not eligible for reimbursement under those circumstances.

If the parents placed the child in the school in order to carry out the terms of the Act, the chosen school must meet the terms of the Act. The lower court expressly found that Trident Academy does not meet the terms of the Act. If the parents placed the child in the school for some other reason, the child is entitled to special education and related services, but the school district is not responsible for the costs of the private school. Nothing in the Act, either expressly or implicitly, allows IDEA funds to be expended for private school expenses where the school does not meet the requirements of the Act.

III. Education of disabled students in a private placement is substantially more expensive than education in a public placement and public funds should not be expended for private placements unless the placement is in accordance with the IDEA.

This case is extremely important to school districts across the country because of its financial implications. Private schools are usually substantially more expensive than public placements, particularly when compared to a "mainstreamed" or partially mainstreamed public environment. In 1989 the U.S Department of Education reported to Congress that the average per-pupil education expenditure for special education and related services in a school district resource program is $2398; in a self-contained program in school districts it is $5700, whereas the average per pupil expenditure for private residential programs is $31,616 (includes residential costs.) U.S. Department of Education, Eleventh Annual Report to Congress on the Implementation of The Education of the

Handicapped Act 119, 127 (1989). All of these figures compare with the average total cost of $2780 for a student who spends full time in the regular education program. Id. at 147.

When the Education of the Handicapped Act (now Part B of IDEA) was passed in 1975, Congress made the commitment to provide states with 40% of the national average per pupil expenditure for each eligible child to be used to defray the "excess costs" associated with meeting the educational needs of a child with a disability. Unfortunately, Congress has never come close to meeting that promise. Funding for the program has never exceeded 12% of the national average per pupil expenditure -- currently funding equals only 7%. U.S. Dept. of Education, Justification of Appropriation Estimates to the Congress Fiscal Year 1993 F-19 (1992). Special education expenditures have risen from approximately $11.75 billion in 1982-83 to over $16 billion in 1986-87, with the federal government

picking up only slightly more than $1 billion. Statement of the Ad Hoc Coalition to Increase Federal Funding for the Education of Children with Disabilities, issued Spring, 1992 by the National School Boards Association, American Association of School Administrators, Council for Exceptional Children, National Association of State Directors of Special Education, National Association of State Boards of Education and National Parent Network on Disabilities.

A survey of 18 states conducted by the National Association of State Directors of Special Education showed that although the number of special education students increased from approximately 6% over the period from fiscal 1985 to fiscal 1991, state special education expenditures increased in those states by nearly 70%. The cost of private placements was a major contributor to this increase.

The combination of inordinate expense of special education together with the increase in societal pressures on the educational system (e.g. the increase in families living in poverty,[2] the effects of alcohol/drug dependency and the increase in populations of immigrants[3]) together with a higher increase in the inflation rate for schools[4] threatens to overload the public education system in many states and localities. Under such circumstances, school districts should not be forced to spend public funds on private schools that do not meet state educational standards.

---

[2] In 1985, 12.5 million children were classified as living in poverty. The proportion has risen from 1 in 8 during the 1970s to 1 in 5.1. Robinson, G. and Protheroe, G., Cost of Education, 82.

[3] Projections show the number of limited English proficient children (ages 5 to 14) increasing 16.7% between 1980 and 1990, and increasing 41.7% between 1980 and 2000. Id.

[4] A School Price Index, developed in 1975, demonstrated a more rapid rate of inflation for the special mix of goods and services unique to education for the period from 1975 to 1986 than the Consumer Price Index, 132.4 points as compared to 110.1 points. Id. at 27.

Conclusion

Amici urges this Court to reverse the decision of the lower court and direct the court to enter judgment for the Petitioners.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record
Deputy General Counsel
National School Boards
Association (NSBA)
1680 Duke Street
Alexandria, VA 22316
(703) 838-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

No. 91-1523

Supreme Court, U.S.
FILED
APR 29 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, *et al.*,
Petitioners,
v.
SHANNON CARTER, by and through her father and next friend, EMORY CARTER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RICHARD RUDA *
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol St., N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a learning disabled child's parents are entitled to public reimbursement under the Individuals with Disabilities Education Act when they unilaterally place her in a private school that does not meet state educational standards and does not provide education in conformity with an individualized education program (IEP).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. THE REMEDY UPHELD BY THE COURT OF APPEALS IS INCONSISTENT WITH THE STATUTORY PURPOSE DETAILED IN THE IDEA	6
A. The Overarching Purpose of the IDEA Is To Safeguard the Right of Children With Disabilities to a "Free Appropriate Public Education"	7
B. The Reimbursement Remedy Upheld By the Court of Appeals Is Improper as It Contravenes the Purpose of the Statute	10
1. "Appropriate" Relief Under the IDEA, Like That Granted in *Burlington*, Effectuates the State's Statutory Obligation to Provide a Free Appropriate Public Education	10
2. The Approach to Reimbursement Advocated by Respondents and the United States Would Undermine the Purpose of the IDEA	14
a. Trident Failed to Meet the Standards of the State Educational Agency	17
b. Shannon's Education Was Not Provided in Conformity With an IEP	19
c. The Trident Placement Was Not an "Appropriate" Placement Under the Act	19

TABLE OF CONTENTS—Continued

	Page
II. THE COURT OF APPEALS' REIMBURSEMENT REMEDY IMPERMISSIBLY ENCROACHES ON STATE AND LOCAL AUTHORITY OVER THE EDUCATION OF CHILDREN WITH DISABILITIES	21
A. The Court of Appeals' Remedy Erodes the States' Role in Setting Educational Standards in a Manner Never Contemplated By Congress	21
B. States Did Not Agree to Relinquish Control Over Educational Standards As a Condition of Receiving Federal Funding Pursuant to the Act	23
C. The Court of Appeals' Reimbursement Remedy Hinders the Ability of State and Local Governments to Devote Their Limited Resources to High Quality, Cost-Effective Educational Services	25
CONCLUSION	29

TABLE OF AUTHORITIES

Cases:	Page
Antkowiak v. Ambach, 838 F.2d 635 (2d Cir.), *cert. denied*, 488 U.S. 850 (1988)	8
Bell v. Hood, 327 U.S. 678 (1946)	7
Board of Education v. Rowley, 458 U.S. 176 (1982)	*passim*
In re Conklin, 946 F.2d 306 (4th Cir. 1991)	27
Dellmuth v. Muth, 491 U.S. 223 (1989)	24
Drew P. v. Clarke County School District, 877 F.2d 927 (11th Cir. 1989), *cert. denied*, 494 U.S. 1046 (1990)	28
Epperson v. Arkansas, 393 U.S. 97 (1968)	21
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)	4, 21
Honig v. Doe, 484 U.S. 305 (1988)	9, 19
Matta v. Board of Education, 731 F. Supp. 253 (S.D. Ohio 1990)	28
Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981)	5, 23-24, 25
Porter v. Warner Holding Co., 328 U.S. 395 (1945)	6
Roland M. v. Concord School Committee, 910 F.2d 983 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1122 (1991)	10, 20, 21
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)	21
Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987)	8
School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359 (1985)	*passim*
SEC v. Sloan, 436 U.S. 103 (1978)	6
Sheridan Road Baptist Church v. Dept. of Education, 396 N.W.2d 373 (Mich. 1986), *cert. denied*, 481 U.S. 1050 (1987)	22
Touche Ross & Co. v. Redington, 442 U.S. 560 (1979)	6
Town of Burlington v. Dept. of Educ., 736 F.2d 773 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985)	22
Tucker v. Bay Shore Union Free School District, 873 F.2d 563 (2d Cir. 1989)	18

TABLE OF AUTHORITIES—Continued

	Page
Wood v. Strickland, 420 U.S. 308 (1975)	21
Statutes and Regulations:	
The Individuals With Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*	2
20 U.S.C. § 1400(c)	2, 7
20 U.S.C. § 1401(a)(18)	*passim*
20 U.S.C. § 1401(a)(20)	9, 10
20 U.S.C. § 1412	20
20 U.S.C. § 1412(5)(B)	10
20 U.S.C. § 1412(6)	8, 25, 27
20 U.S.C. § 1413(a)(4)(B)	8, 9, 23
20 U.S.C. § 1414	11
20 U.S.C. § 1415(e)(2)	2, 4, 7
34 C.F.R. § 300.550(b)(1)	10
34 C.F.R. § 300.750 & comment	9
34 C.F.R. § 300.753(b)(2)	9
Other Authorities:	
Jane Knitzer *et al.*, *At the Schoolhouse Door: An Examination of Programs and Policies for Children with Behavioral and Emotional Problems* (1990)	26
Maryland Department of Fiscal Services, *Special Education: A Review of Programs and Funding in Maryland* (1983)	26
National Center for Education Statistics, *Digest of Education Statistics* (1992)	26
National Governors' Association, *Time for Results: The Governors' 1991 Report on Education* (1986)	22
National Governors' Association & National Association of State Budget Officers, *The Fiscal Survey of States* (April 1993)	26
S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425	10

TABLE OF AUTHORITIES—Continued

	Page
U.S. Advisory Commission on Intergovernmental Relations, *The Structure of State Aid to Elementary and Secondary Education* (1990)	2
Virginia Board of Education, *A Study of the Preparation of Special Education Instructional and Administrative Personnel, Class Size Requirements and the Funding of Special Education Programs*, Va. S. Doc. No. 13 (1990)	22
Arthur E. Wise *et al.*, *Licensing Teachers: Design for a Teaching Profession* (1987)	23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1523

FLORENCE COUNTY SCHOOL DISTRICT FOUR, *et al.*,
Petitioners,

v.

SHANNON CARTER, by and through her father and next friend, EMORY CARTER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, AND NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Issues concerning the provision of primary and secondary education are of the utmost fiscal and social importance to *amici*; education is the single largest expenditure of state

and local governments. *See* U.S. Advisory Commission on Intergovernmental Relations, *The Structure of State Aid to Elementary and Secondary Education* iii (1990).

The court of appeals' decision threatens the ability of state and local governments to provide children with high quality, cost-effective education by requiring reimbursement under the Individuals with Disabilities Education Act for unilateral parental placements that do not meet state educational standards. Unless corrected, the court of appeals' holding will undermine those standards and seriously impair the ability of state and local governments to make effective use of their finite resources available for education. *Amici* accordingly submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE

Amici adopt petitioners' statement of the case.

SUMMARY OF ARGUMENT

1. A remedy granted pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* (formerly the Education of the Handicapped Act), must be " 'appropriate' in light of the purpose of the Act." *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359, 369 (1985) ("*Burlington*") (quoting 20 U.S.C. § 1415(e)(2)). It must, therefore, further the Act's primary purpose of "provid-[ing] handicapped children with 'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.' " *Id.* (quoting 20 U.S.C. § 1400(c)). The reimbursement remedy upheld by the court of appeals not only fails to advance this overarching purpose of the IDEA, it undermines it. For this reason, the judgment of the court of appeals should be reversed.

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37 of the Rules of this Court.

The Act gives the term "free appropriate public education" ("FAPE") a precise meaning, one which incorporates specific substantive requirements that reflect congressional policy choices. The Carters' placement of Shannon at Trident Academy lacked two of the elements Congress viewed as critical to the educational opportunity it sought to provide disabled children: (1) that the education meet the standards of the state educational agency; and (2) that education be provided in conformity with an individualized education program (IEP). *See* 20 U.S.C. § 1401(a)(18). The absence of either one of these elements precludes reimbursement, since public reimbursement for such a placement would not advance the Act's carefully crafted, multifaceted objective. On the contrary, such reimbursement virtually guarantees that fewer children with disabilities will receive the full measure of educational opportunity that Congress envisioned for them, by creating financial incentives in favor of placements which do not embody all of the elements Congress deemed essential.

In contending that the specifics of a "free appropriate public education" are irrelevant to reimbursements for parental placements since the Act does not, by its terms, place any obligations or limitations on parents, respondents and the United States disregard the proper scope of statutory relief. Remedial relief formulated pursuant to a statute must be affirmatively grounded in congressional intent and consistent with the statutory scheme; it cannot be based merely on the statute's failure to forbid it.

Indeed, in a related context, this Court expressly recognized that Congress did not intend for the IDEA to give courts "a free hand to impose substantive standards of review which cannot be derived from the Act itself." *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982). On the contrary, "the statutory authorization to grant 'such relief as the court determines is appropriate' cannot be read without reference to the obligations,

largely procedural in nature, which are imposed upon recipient States by Congress." *Id.* (quoting 20 U.S.C. § 1415(e)(2)). Yet respondents and the United States, like the court of appeals, would impose a rule which would completely divorce the conditions of reimbursement from the substance of the State's statutory obligation, leaving determinations of educational appropriateness to federal judges. This approach is inconsistent with the statutory scheme, with this Court's decision in *Burlington*, and with a long line of decisions emphasizing the limited role of federal courts in the field of education. *See, e.g., Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

Respondents and the United States suggest that parents, acting unilaterally, may not literally provide a "free appropriate public education" to their children, since the statutory definition presupposes the active involvement of public school officials in supervising the child's education. This does not, however, make the terms of the FAPE irrelevant to parental reimbursement, as respondents and the United States imply; instead, it merely highlights the operation of the *Burlington* remedy.

The *Burlington* rule was prompted by a school district's failure to do the very things that the statute required of it. In such an instance, the Court held, parents may step in and take the action which the school district failed to take by providing an education that is "proper under the Act." *Burlington*, 471 U.S. at 369. Whether such a unilateral parental placement is "proper under the Act" can only be determined by reference to the specific substantive requirements placed on States by the Act. Hence, the Court's reimbursement remedy in *Burlington* was designed to enforce, retroactively, the town's obligation under the Act, by "merely requir[ing] the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." *Id.* at 370-71.

The *Burlington* Court did not, in short, give parents an open-ended entitlement to the education of their choice whenever the school district fails to make a proper placement. *Burlington* limits reimbursement to parents who make placements which are "proper under the Act." *Id.* at 369. A placement, such as respondents' at Trident, which lacks central elements of the educational opportunity Congress sought to provide cannot effectuate the State's obligation or the Act's fundamental purpose; hence, under *Burlington*, it cannot be "proper under the Act."

2. If allowed to stand, the decision of the court of appeals will disrupt the balance of power among federal, state and local governments with respect to the education of children with disabilities and distort the cooperative framework that Congress chose to create under the Act. The long-standing role of States in setting educational standards will be supplanted in a manner never intended by Congress. As the Court observed in *Rowley*, "Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped." 458 U.S. at 208.

Moreover, the usurpation of the States' historic role in setting standards would violate the principles this Court set out in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981), and applied in *Rowley*, since States never agreed to relinquish control over the setting of educational standards as a condition of receiving federal funds under the IDEA. On the contrary, the Act reinforces the primacy of state educational standards by expressly incorporating them into the statutory scheme.

Finally, reimbursement for placements such as the Carters' would undermine the efforts of state and local governments in providing high-quality education and pursuing the most cost-effective uses for limited special edu-

cation dollars. Standards set by the state educational agency provide a necessary check on the quality and cost-effectiveness of the programs which state and local governments fund. The court of appeals' decision removes this crucial check, requiring state and local governments to spend money out of the public fisc on programs over which they have no control, and which are utterly unaccountable to them. This, *amici* submit, is a result intended neither by Congress in the IDEA nor by this Court in *Burlington*.

ARGUMENT

I. THE REMEDY UPHELD BY THE COURT OF APPEALS IS INCONSISTENT WITH THE STATUTORY PURPOSE DETAILED IN THE IDEA

This Court has repeatedly emphasized that a remedy cannot be imposed pursuant to a statute unless that remedy comports with congressional intent and is consistent with the statutory scheme. Acting within its discretion, a court may frame equitable remedies which are necessary "to give effect to the policy of Congress" and which effectuate the purposes of the statute. *Porter v. Warner Holding Co.*, 328 U.S. 395, 400 (1946).[2] Hence, the starting point in determining the availability of a particular remedy is whether that remedy would further the specific purposes and policies embodied in the legislation. A remedy inconsistent with the statute's purposes is impermissible, since it does not accord with congressional intent. *A fortiori*, a remedy like that upheld by the court of appeals, which undercuts the purposes of the statute

[2] *Cf. Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (in implying causes of action, "ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law"); *SEC v. Sloan*, 436 U.S. 103, 116 (1978) (Court "not inclined to read [remedial provision of statute] more broadly than its language and the statutory scheme reasonably permit").

and directly contravenes the intentions Congress expressed therein, is invalid.

Even where a statute confers a very broad grant of remedial authority, remedies must nevertheless serve to "make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946). The propriety of a particular remedy must therefore be determined by reference to the specific content of the statutory or constitutional provisions that have allegedly been violated. *Id.* at 684-85. Where, as here, the "wrong done" is the failure to fulfill a specific statutory obligation, that "wrong" must be corrected by effectuating that specific obligation, not by imposing different or inconsistent sets of obligations on the party who fell short of the statutory requirement.

While Congress did not itemize the types of remedial relief permissible under the IDEA, it authorized courts to grant only "appropriate" relief. 20 U.S.C. § 1415(e)(2). In *School Committee of the Town of Burlington v. Department of Education*, 471 U.S. 359, 369 (1985), this Court concluded that "[a]bsent other reference, the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act." That purpose, the Court said, is "principally to provide handicapped children with 'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.'" *Id.* (quoting 20 U.S.C. § 1400(c)). When assessed against this central congressional purpose, which is carefully detailed within the IDEA, the court of appeals' remedy is plainly improper.

A. The Overarching Purpose of the IDEA is to Safeguard the Right of Children With Disabilities to a "Free Appropriate Public Education"

Congress had something very specific in mind when it set out to guarantee all children with disabilities a "free

appropriate public education" ["FAPE"].[3] Rather than leaving the meaning of that term open-ended, Congress provided a statutory definition which comprises a virtual "checklist for adequacy." *Board of Education v. Rowley*, 458 U.S. 176, 189 (1982). One central element of the carefully delineated congressional purpose is that handicapped children must be afforded an education that meets the standards of the state educational agency. 20 U.S.C. § 1401(a)(18)(B). A second central element is that education must be provided in conformity with an individualized education program (IEP). *Id.* § 1401 (a)(18)(D).

State Educational Standards. Congress left undisturbed the States' role in setting educational standards by expressly incorporating "the standards of the State educational agency" into the statutory definition of a FAPE. 20 U.S.C. § 1401(a)(18)(B); *see* 20 U.S.C. §§ 1412(6) and 1413(a)(4)(B).[4] By making compliance with state educational standards a central element of a FAPE, Congress expressed its judgment that the standards set by the States were meaningful guarantors of quality in education. These standards were deemed so important

[3] The IDEA contains the following definition:

> The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
>
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18).

[4] *See, e.g., Schimmel v. Spillane*, 819 F.2d 477, 484 (4th Cir. 1987) (IDEA "expressly incorporates State educational standards"); *Antkowiak v. Ambach*, 838 F.2d 635, 640 (2d Cir.) (same), *cert. denied*, 488 U.S. 850 (1988).

that Congress required them to be met in any public school or private school placement made pursuant to the Act. *See* 20 U.S.C. § 1413(a)(4)(B).[5]

Individualized Education Program. Congress made the IEP a central component of the States' statutory obligation to provide a FAPE, and specifically defined it within the Act. *See* 20 U.S.C. §§ 1401(a)(18) and (20). As this Court noted in *Honig v. Doe*, 484 U.S. 305, 311 (1988), Congress "[e]nvision[ed] the IEP as the centerpiece of the statute's education delivery system for disabled children." In *Burlington*, the Court reiterated that the IEP is the "*modus operandi* of the Act." 471 U.S. at 368.

The IEP is the vehicle through which a number of statutory objectives are fulfilled. One of the major features of an IEP is the individualized formulation of "annual goals, including short-term instructional objectives" for each disabled child, to be reevaluated on at least an annual basis. 20 U.S.C. § 1401(a)(20). This feature is, of course, designed to facilitate academic progress. Significantly, however, the statutory definition of an IEP also evidences other congressional purposes.

One such additional purpose is providing a vehicle through which parental involvement is assured. The statutory definition of the IEP specifically contemplates a close working relationship between parents and educators in formulating an individualized education program fitted to the unique needs of each child.[6] *See* 20 U.S.C. § 1401

[5] Not only are state educational standards made part of the statutory scheme, a child who attends a school which does not meet state educational standards cannot be counted by a State for federal funding allocation purposes. 34 C.F.R. § 300.750 & comment thereto (1992); *id.* § 300.753(b)(2).

[6] The statutory definition of the IEP contemplates that parents will work with public school officials to develop an IEP. Where

(a)(20). *See also Rowley*, 458 U.S. at 208-09 (quoting S. Rep. No. 168, 94th Cong., 1st Sess. 11-12 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1435).

The IEP also serves to further the statutory purpose of providing education for children with disabilities in the least restrictive environment. One of the required components of an IEP is a statement of "the extent to which such child will be able to participate in regular educational programs." 20 U.S.C. § 1401(a)(20)(C). Hence, the IEP, by Congress' design, compels consideration of the extent to which the congressional preference for such "mainstreaming" can be fulfilled with respect to each child.[7]

B. The Reimbursement Remedy Upheld by the Court of Appeals is Improper as It Contravenes the Purpose of the Statute

1. *"Appropriate" Relief Under the IDEA, Like That Granted in* Burlington, *Effectuates the State's Statutory Obligation to Provide a Free Appropriate Public Education*

Although the IDEA gives courts the power to grant "appropriate" relief, it does not give them *carte blanche* to fashion remedies under the auspices of the Act without

---

the public school officials and the parents have reached an impasse, however, this collaboration will not be possible. Nevertheless, by working with the educators at a private school to develop the type of IEP envisioned in the statute, parents can effectively do what the school district failed to do and thereby advance the purposes of the Act. *Burlington*'s remedial approach is premised upon the idea that unilateral parental action undertaken in the face of impasse can effectuate the State's statutory obligation.

[7] *See Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990) ("An IEP must prescribe a pedagogical format in which, 'to the maximum extent appropriate,' a handicapped student is educated 'with children who are not handicapped.'") (quoting U.S.C. § 1412(5)(B); C.F.R. § 300.550(b)(1)), *cert. denied*, 111 S.Ct. 1122 (1991).

regard to the Act's purposes. Instead, relief must be " 'appropriate' in light of the purpose of the Act." *Burlington*, 471 U.S. at 369.[8] As the preceding discussion indicates, that purpose is a detailed and specific one which incorporates a number of congressional policy choices.

As the Court held in *Rowley* in the context of a parental challenge to the sufficiency of an IEP, "the statutory authorization to grant 'such relief as the court determines is appropriate' cannot be read without reference to the obligations, largely procedural in nature, which are imposed upon recipient States by Congress." 458 U.S. at 206. The propriety of a remedy formulated pursuant to the Act must, therefore, turn on its ability to effectuate *the States'* statutory obligation of providing a FAPE to each disabled child—not on its capacity to advance the private educational agendas of individual parents.

Consistent with this analysis, the Court in *Burlington* premised its view of "appropriate" relief, even in the context of unilateral placements, on the enforcement of the State's statutory obligation. Where parents believe that the school district has failed to carry out its obligation, they may unilaterally undertake to do what the school district *should have done* to fulfill its statutory obligation.[9] If their views are later vindicated—the parent's placement, rather than the school's, was indeed the "appropriate" one under the Act—they may be reimbursed.

Such reimbursement makes the school district pay after the fact for the educational placement which *it should*

---

[8] *See also Rowley*, 458 U.S. at 206 (noting in the context of a challenge to an IEP that Congress did not "intend[] that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself").

[9] Because a State's obligation to provide a FAPE must largely be accomplished through the actions of local school districts, the IDEA places obligations on them as well. *See, e.g.*, 20 U.S.C. § 1414.

have funded directly. The *Burlington* remedy thus "merely requires the Town to belatedly pay expenses that it should have paid all along and *would have borne in the first instance* had it developed a proper IEP." *Burlington*, 471 U.S. at 370-71 (emphasis added). Hence, a state or local government is forced to retroactively pay for the same education which a court would have prospectively required it to provide, were the process of judicial review more expedient. *See Burlington*, 471 U.S. at 370 ("If the administrative and judicial review under the Act could be completed in a matter of weeks, rather than years, it would be difficult to imagine a case in which such prospective injunctive relief would not be sufficient.").

The Court carefully characterized its reimbursement remedy as an unavoidable corollary of such prospective relief, a practical solution necessitated by the "ponderous" realities of litigation.[10] 471 U.S. at 370. The Court recognized that compelling a school district to fulfill its statutory obligation prospectively was not a complete solution, since a great length of time critical to the child's development might elapse before such relief could be ordered. *Id.* Hence, *Burlington* provided for retroactive relief in those instances where parental actions during the interim prior to judicial review serve to effectuate the school district's obligation.

That *Burlington*'s retroactive relief is, in effect, the functional equivalent of prospective relief is evident in the parallel tests the Court articulates for these two types of remedies. Reimbursement for a parental private school

[10] The Court stressed that reimbursement represented the retroactive enforcement of the town's statutory obligation, rather than "damages." *Burlington*, 471 U.S. at 370-71. Thus reimbursement is not, as respondents contend, merely "a remedy for *violation* of [the State's] obligation." Opp. 27-28 (emphasis in original). It is plainly not enough, under *Burlington*, for a parent to demonstrate a school district's default; the parent must also show that his or her own placement effectuated the State's obligation.

placement, *Burlington* holds, is appropriate "if the court ultimately determines that such [parental] placement, rather than a proposed IEP, is proper under the Act." 471 U.S. at 369. Yet the Court arrived at that holding by extrapolating from the same test's applicability to prospective relief:

> In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school.

471 U.S. at 370.

Under no tenable interpretation would it be "proper under the Act" to require prospectively that a school district place a child in a parentally selected school which does not meet the minimum educational standards of the state educational agency; the same standard of parental selection must also apply where retroactive relief is at issue. The focus of relief, whether prospective or retroactive, is the effectuation of the *State's* statutory obligation.

Of course, even under *Burlington*, the education which a parent unilaterally provides to a child is, at the time of provision, neither "free" nor "public."[11] Yet this does not alter the ability of a parent to effectuate the school district's statutory obligation by undertaking unilaterally to perform the functions assigned to public school officials. A parent cannot force the school district to make the private school placement mandated by the statute,

[11] Since the terms of the FAPE designate public school officials as actors, in some instances a parent may not literally be able to provide a FAPE. *See* Opp. 28; Br. *Am. Cur.* of U.S. on Petition at 15 n.11.

but the parent can, under *Burlington*, make that placement himself. A parent cannot force public school officials to participate in the formulation of an IEP at that private school, but the parent can work with the private educators to fulfill the IEP requirement. A parent cannot force public school officials to supervise the education of the child at a private school, but the parent can perform that monitoring function himself.

In other words, the fact that a parent cannot make a placement "free" or "public" at its inception does not remove the requirement that the parent's placement be "appropriate" within the meaning of the State's statutory oblgation. Reimbursement serves to fulfill the State's obligation retroactively by making what is already an "appropriate" placement both "free" and "public." An inappropriate placement violates the State's obligation; it therefore cannot form the basis for the retroactive enforcement of that obligation through reimbursement.

As the Court observed in *Burlington*, "[t]he Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." 471 U.S. at 372. Respondents, in their efforts to obtain a free education, would have this Court read the term "appropriate" out of the statute's prescription. The remedy which they advocate is flatly inconsistent both with the language and purpose of the IDEA, and with this Court's holding in *Burlington*.

2. *The Approach to Reimbursement Advocated by Respondents and the United States Would Undermine the Purpose of the IDEA*

The statutory interpretation articulated by the court of appeals and relied upon by the respondents and the United States evidences a disregard of the limits of judicial relief. This interpretation seeks justification not in the language or purpose of the statute, but in the IDEA's

failure to place limits on a remedy it never even addresses—the reimbursement for unilateral parental placements first recognized by this Court in *Burlington*. Since the statutory obligation placed on the States in the IDEA does not literally refer to or limit post-*Burlington* parental placements, they reason, a court is free to reimburse for such placements even when they deviate from the specifics of the State's statutory obligation. *See* Opp. at 16-18; Br. *Am. Cur.* of U.S. on Petition at 16. Yet in emphasizing what the statute does not say, respondents and the United States all but ignore the ultimate inquiry in assessing federal judicial relief—whether the remedy is consistent with what the statute does say, that is, whether it furthers the evident statutory purposes.[12] This approach disregards the well-established rule that remedial action must be affirmatively grounded in congressional intent and must further the statute's purposes.

Respondents and the United States avoid addressing matters of statutory purpose by retreating to the court of appeals' erroneous application of the *Burlington* test. Under *Burlington*, reimbursement is conditioned on a finding that a parent's "placement, rather than a proposed IEP, is proper under the Act." 471 U.S. at 369. Ignoring *Burlington*'s analysis, as well as the language and purpose of the IDEA, the court of appeals held that a parental placement need not conform to the terms of the IDEA in order to be "proper under the Act," as long as

---

[12] Although the United States' discussion of appropriate remedies correctly indicates that furtherance of the statute's purposes is essential, *see* Br. *Am. Cur.* of U.S. on Petition at 12, the United States fails to meaningfully address the effect that reimbursing Shannon's placement would have on the statutory goal of providing a FAPE. Respondents merely repeat the court of appeals' assertion that "[c]onditioning reimbursement under *Burlington* on state approval of the private school would undermine the values and policies the Act was enacted to further" without providing any analysis as to what "values and policies" would be furthered by reimbursing for a placement which fails to provide two essential elements of a FAPE. *See* Opp. 18 (quoting Pet. App. 17a).

it is "reasonably calculated to enable the child to receive educational benefits."[13] Pet. App. 16a-17a. Adopting the court of appeals' definition of the phrase "proper under the Act," respondents and the United States assert that Shannon's placement was an "appropriate" one since she was found to have made academic progress. *See* Opp. at 14-15; Br. *Am. Cur.* of U.S. on Petition at 16-17.

Yet by modifying the word "proper" with the phrase "under the Act," the *Burlington* Court clearly intended for the propriety of a parental placement to be ascertained by reference to the obligation set forth in the Act, not by reference to a judge's own views. *Cf. Rowley*, 458 U.S. at 206. The statute does not set forth any standards for parental placements; the words "under the Act" must therefore refer to the State's statutory obligation or be completely meaningless. Moreover, the *Burlington* Court also used the words "proper under the Act" to refer to school district placements, 471 U.S. at 369, and to the type of proposed parental placement that could give rise to *prospective* relief. 471 U.S. at 370.[14] This indicates that the Court had but one standard of propriety in mind—the one set forth in the statute.

Ignoring these indications, respondents and the United States would cut *Burlington*'s reimbursement test loose from its statutory and analytic moorings to justify a result at odds with the intent of Congress and the holdings of this Court: reimbursement for Shannon Carter's placement at Trident, a school which the court of appeals

[13] This verbal formulation is taken from the *Rowley* opinion. 458 U.S. at 206-07. Yet the language which the court of appeals borrowed constitutes only one part of *Rowley's* analysis regarding the appropriateness of a placement—the *Rowley* Court also viewed satisfaction of the "items on the definitional checklist" of a FAPE as mandatory. 458 U.S. at 189; *see id.* at 206 & n.27. Taking this language out of the context in which it was used in *Rowley*, the court of appeals created an erroneous standard.

[14] Indeed, the Court's analogy to prospective relief is a critical part of its analysis. *See* pp. 12-13, *supra*.

found "does not attempt to comply with the terms of the Act." *See* Pet. App. 11a. A school's inability to satisfy any one element of the statute's requirements would be sufficient to preclude reimbursement; Trident's two failings represent separate and independent grounds for reversal of the court of appeals' decision.

(a) *Trident Failed to Meet the Standards of the State Educational Agency*

The court of appeals found that at least two Trident teachers, one of whom taught Shannon, were not certified as required by state educational standards. Pet. App. 11a-12a. By upholding reimbursement of Shannon's placement despite this failing, the court of appeals contravened express statutory language that makes those standards an elemental part of the educational opportunity Congress wished to guarantee children with disabilities. *See, e.g.*, 20 U.S.C. § 1401(a)(18)(B).

In justifying this outcome, respondent and the United States assert that parents cannot be expected to "assess compliance with [South Carolina's] voluminous standards." Opp. 24; *see* Br. *Am. Cur.* of U.S. on Petition at 14-15. If such requirements were imposed on parents, the United States argues, "the parents' right to obtain a free, appropriate education for their child would be held hostage to the state or local agency's willingness to cooperate in the parents' efforts to find an alternative placement for their child." Br. *Am. Cur.* of U.S. on Petition at 14-15.

Yet the ability of parents to place their children in schools which comply with the statutory criteria is not dependent on any act of state or local approval. The statute simply requires that the education provided to a child with a disability "meet the standards of the State educational agency." 20 U.S.C. § 1401(a)(18)(B). While some States have compiled lists of "approved"

schools which meet their educational standards,[15] it is the objective meeting of educational standards rather than any specific act of approval which is crucial under the statute. Compliance with the objective standards promulgated by the State educational agency is the definitive criterion, not a state or local agency's advance approval of a particular school or placement.

Nor do parents need to rely on assistance from state or local educational agencies to determine whether a particular private school meets educational standards. Because private schools have a financial incentive to attract students, schools which meet the state educational standards will doubtless make their compliance known to interested parents.[16]

Equally important, in focusing on the convenience of parents in making placements, respondents lose sight of the fundamental nature and purpose of the *Burlington* remedy. The *Burlington* Court did not pretend to offer parents an easy or risk-free option to be undertaken lightly. Because a parent, in making a unilateral placement, is stepping into the unfamiliar realm of educational judgment calls, the Court recognized that the path to reimbursement is necessarily fraught with financial risk and uncertainty. *See Burlington*, 471 U.S. at 373-74. *Burlington* did, however, offer parents willing to take that risk the possibility of reimbursement should a court later find that they had, in effect, done the job that the school district should have done.

---

[15] New York is one such State. *See Tucker v. Bay Shore Union Free School District*, 873 F.2d 563, 567 (2d Cir. 1989).

[16] Moreover, if compliance with state educational standards is recognized as a requirement for reimbursement, there will be increased parental demand for private schools that comply, inducing more private schools to meet those standards.

(b) *Shannon's Education Was Not Provided in Conformity With an IEP*

Respondents and the United States, like the court of appeals, maintain that Shannon's education was "proper under the Act" even though it lacked an IEP, which this Court has identified as "the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. at 311. Intimating that Trident's shortcoming in this regard was one of form rather than substance, the court of appeals explained that "Trident does not . . . develop education plans called IEPs, though it does set goals for students and revise them four times per school year." Pet. App. 11a. This ignores the fact that IEPs formulated pursuant to Congress' specifications serve a number of purposes, some of which are not directly related to academic goal-setting.

Specifically, the IEPs which Congress made a central element of a FAPE serve both to engage parents in the educational process and to provide a vehicle through which Congress' preference for education in the least restrictive environment can be fulfilled.[17] Hence, the court of appeals erred in assuming that Trident's system of goal setting was sufficient to provide the type of "appropriate" education that Congress had in mind.

(c) *The Trident Placement Was Not an "Appropriate" Placement Under the Act*

Only by substituting its own view of an "appropriate" education for that detailed by Congress in the IDEA could the court of appeals have concluded that the educa-

---

[17] Dr. Richard Ferrante, who conducted the state educational agency's review of the Carters' due process hearing, expressed the opinion that the Trident placement itself violated the principle of least restrictive environment: "Clearly, the concept of least restrictive environment is violated in the extreme by removing this child from her natural family so that she might attend an institution alleged to have a better program than the public school setting." Pet. App. 42a.

tion Shannon received at Trident was reimbursable under *Burlington*. Shannon's placement at Trident contravened two separate elements which Congress found essential to its statutory goal of providing a "free appropriate public education" to all children with disabilities. The court of appeals' decision that the education Shannon received at Trident was nonetheless "proper under the Act" appears to have been driven solely by the court's own after-the-fact assessment that Shannon made sufficient academic progress.

Yet academic progress is but one aspect of the appropriate education Congress sought to guarantee through the IDEA. Congress also sought to ensure that disabled children would be educated in accordance with the same quality standards as other public school students, that they would receive individualized programs of instruction, that their parents would participate in the educational process, and that they would be, to the extent feasible, educated with nonhandicapped children. *See, e.g.*, 20 U.S.C. §§ 1401(a)(18) and 1412; *Roland M.*, 910 F.2d at 992 ("purely academic progress—maximizing academic potential—is not the only indicia of educational benefit implicated . . . by the Act"). The court of appeals' determination that Shannon's education was "appropriate" based on its own judgments concerning academic progress can only serve to undermine those other statutory purposes, a result Congress clearly did not intend.

If a unilateral parental placement need only live up to a federal judge's view of academic adequacy in order to be reimbursable, parents and private schools will no longer strive to effectuate Congress' multifaceted vision of an "appropriate" education. By sanctioning reimbursement without regard to the nonacademic aspects of the statutory mandate, the court of appeals' judgment virtually ensures that fewer children with disabilities will receive the type of education which Congress expressly

sought to provide them through the IDEA. Because this remedy works at cross purposes with congressional intent, it cannot constitute "appropriate" relief under the Act and the judgment below should be reversed.

II. THE COURT OF APPEALS' REIMBURSEMENT REMEDY IMPERMISSIBLY ENCROACHES ON STATE AND LOCAL AUTHORITY OVER THE EDUCATION OF CHILDREN WITH DISABILITIES

A. The Court of Appeals' Remedy Erodes the States' Role in Setting Educational Standards in a Manner Never Contemplated By Congress

This Court has repeatedly emphasized that education is "primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988). *See also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities."); *Wood v. Strickland*, 420 U.S. 308, 326 (1975). Judicial deference to state and local decision-making in the field of education is essential, since "courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" *Rowley*, 458 U.S. at 208 (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 42 (1973)).[18]

Congress, in passing the IDEA, did not shift responsibility for setting educational standards from the States to the federal courts. On the contrary, Congress expressly preserved the role of the state educational agency in setting standards by incorporating those standards into the statutory mandate. Hence, "Congress' intention was

[18] *See also Roland M.*, 910 F.2d at 992 ("[a]cademic standards are matters peculiarly within the expertise of the [state] department [of education] and of local educational authorities") (citation omitted).

not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped." *Rowley*, 458 U.S. at 208.[19]

State standards for teacher certification, which are at issue in this case, represent a particularly important component of States' efforts to improve the quality of education.[20] *See, e.g.*, National Governors' Association, *Time for Results: The Governors' 1991 Report on Education* 32-33 (1986) (for States seeking to improve teacher quality, "[t]he guiding theme has been raising standards at all stages of the teaching career, but especially at training and initial certification"). It is critical that state policymakers develop standards necessary to ensure teacher quality rather than leaving such matters to the judgment of parents, since "[t]he disturbing fact is that parents and citizens may not be able to readily detect important differences between professional levels of teaching and below-par performance." *Id.* at 32 (citation omitted).[21]

---

[19] *See also Town of Burlington v. Dept. of Educ.*, 736 F.2d 773, 785 (1st Cir. 1984) (In the IDEA, "Congress drew the procedural and substantive contours of education for disabled children, but left the shading and tinting of the details largely to the states."), *aff'd*, 471 U.S. 359 (1985).

[20] Courts have recognized the importance of state teacher certification standards to the quality of education. *See, e.g. Sheridan Road Baptist Church v. Dept. of Educ.*, 396 N.W.2d 373, 381 (Mich. 1986) (teacher certification is a compelling state interest), *cert. denied*, 481 U.S. 1050 (1987).

[21] Where education of children with disabilities is involved, the need for qualified teachers is especially pressing. *See* Virginia Board of Education, *A Study of the Preparation of Special Education Instructional And Administrative Personnel, Class Size Requirements and the Funding of Special Education Programs*, Va. S. Doc. No. 13 at 21 (1990) ("Consumers and school division personnel alike warn that the greatest barrier to program quality continues to be the need for qualified teachers of handicapped students.").

In short, state educational standards, such as those governing teacher certification, provide a measure of quality control in special education programs.[22] Congress specifically incorporated those standards into the statutory definition of a FAPE, and specified that those standards would govern without regard to whether the child's FAPE was provided in a public or private school. *See* 20 U.S.C. § 1413(a)(4)(B). This ensures that children with disabilities, whether educated in a public or private school setting, receive an education meeting the same standards of quality as the education provided to other public school students.

Reimbursing for placements which do not meet the quality standards Congress expressly extended to children with disabilities will inevitably erode those standards and the level of educational quality they were calculated to protect. Because this result is at odds with the purposes of the Act, it cannot be undertaken in the name of "appropriate" relief.

B. States Did Not Agree to Relinquish Control Over Educational Standards As a Condition of Receiving Federal Funding Pursuant to the Act

This Court has repeatedly held that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Rowley*, 458 U.S. at 204 n.26 (quoting *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). So that States may enter into such contracts "knowingly, cognizant of the consequences of their participation," this Court has instructed that "if Congress intends to impose a con-

---

[22] *See* Arthur E. Wise *et al.*, *Licensing Teachers: Design for a Teaching Profession* v (1987) ("The primary rationale [for professionalization of teaching] is a need for quality control over a process in which a service is provided to a client who inevitably knows less than the provider.").

dition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17; *see Rowley*, 458 U.S. at 204 n.26.

Under the IDEA, provision of federal funds is conditioned upon the States' obligation to provide a FAPE to children with disabilities.[23] The detailed definition of a FAPE defines the scope of that obligation, and the States are put on notice that relief may be granted which is appropriate to the enforcement of that obligation.[24] Nothing in the statutory language gives States even the vaguest hint that by accepting federal funds, they have ceded the right to set controlling standards for the educational programs which they, in large part, pay for.[25] On the contrary, the IDEA assures States that compliance

[23] The question of whether the Act is premised on the Spending Clause or on the Fourteenth Amendment does not appear to have been definitively decided by the Court. In *Dellmuth v. Muth*, 491 U.S. 223, 227 n.1 (1989), the question was not reached by the Court since the petitioner there conceded that the Act was promulgated pursuant to the Fourteenth Amendment. However, the Court's earlier decision in *Rowley* strongly indicates that the Act is based on Congress' spending power. *See* 458 U.S. at 204 n.26. The fact that the IDEA is couched in terms of conditional federal funding makes it unlikely that Congress was acting pursuant to the Fourteenth Amendment. As in *Pennhurst*, "[s]urely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States." 451 U.S. at 18. Moreover, this Court admonished in *Pennhurst* that "[w]e should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." 451 U.S. at 16.

[24] Hence, the relief granted in *Burlington*, which involved the retroactive enforcement of the State's statutory obligation, was a foreseeable part of the State's "contract" with the federal government.

[25] At present, only about 7% of special education costs are federally funded, compared to the promised funding level of 40%. *See* Br. *Am. Cur.* of National School Boards Association (NSBA) on Petition at 4.

with their own standards is an integral part of the statutory scheme. *See* 20 U.S.C. §§ 1401(a)(18) and 1412(6).

In *Rowley*, the Court rejected an open-ended, unlimited interpretation of the Act's requirement of an "appropriate education" based, in part, on a *Pennhurst* analysis. 458 U.S. at 204 n.26. Since the statutory language and legislative history revealed that Congress had not "imposed upon the States a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication in the courts," *id.* at 190 n.11, it certainly had not done so "unambiguously, as required in the valid exercise of its spending power." *Id.* at 204 n.26 (citing *Pennhurst*, 451 U.S. at 17). *Rowley*'s analysis compels the same conclusion here. States were given no notice that acceptance of federal funds under the IDEA would erode their authority to set standards for special education programs, making their financial exposure for such programs dependent upon the case-by-case educational judgments of federal courts. Because the court of appeals' remedy amounts to the imposition of a new, unexpressed condition of federal funding, its judgment should be reversed.

C. The Court of Appeals' Reimbursement Remedy Hinders the Ability of State and Local Governments to Devote Their Limited Resources to High Quality, Cost-Effective Educational Services

The cost of educating children with disabilities has grown rapidly in recent years, placing an ever-increasing burden on strapped state and local governments.[26] During

[26] *See, e.g.*, Br. *Am. Cur.* of NSBA on Petition at 4-5 and sources cited therein (discussing rising cost of special education nationwide); Pet. 20 n.12 (discussing financial crisis with which school districts are faced). The vast majority of these rising costs must come from state and local governments, since the federal government has never contributed more than a small fraction of the special education assistance it promised to provide. *See* note 25, *supra*.

the 1989-90 academic year, over 4.6 million children (11.44% of the total enrollment) were educated pursuant to federally funded special education programs such as the IDEA. National Center for Education Statistics, *Digest of Education Statistics* 64 (1992) (Table 50). To meet the needs of children with disabilities within the constraints of their limited resources, state and local governments have recognized the need to make special education more cost-effective.[27]

Quality control and cost-effectiveness are of particular concern where private placements are involved, since neither the State nor the local school district is directly providing services. Standards set by the state educational agency provide a measure of quality control in substantive educational matters where a private school placement is involved; they can also serve other purposes, such as making educational programs safe for the children enrolled in them, or making them financially accountable to the public entities which must pay for them.

Where the school district itself makes the private placement, there are other checks as well. The public school

---

[27] *See, e.g.*, Maryland Dept. of Fiscal Services, *Special Education: A Review of Programs and Funding in Maryland* 37 (1983) ("Policymakers and practioners alike now realize that fiscal retrenchment demands an active search for more effective ways to do more with less."). *See also* Jane Knitzer *et al.*, *At the Schoolhouse Door: An Examination of Programs and Policies for Children with Behavioral and Emotional Problems* 119 (1990) (suggesting that States "take steps to undo dysfunctional patterns of fiscal incentives towards high cost placements for children with behavioral and emotional disorders").

Efforts to make special education more cost-effective are reflective of the States' present approach to the provision of all services. *See* National Governors' Association & National Association of State Budget Officers, *The Fiscal Survey of States* 31 (April 1993). "Major reform already is underway in many states to ensure that limited resources are spent on efficient and effective programs that address critical priorities." *Id.*

officials are involved in the selection of the school and the formulation of the IEP; they also perform a supervisory role with respect to the child's education. *See, e.g.*, 20 U.S.C. § 1412(6). In contrast, where parents make the placement, standards set by the state educational agency constitute the *only* measure of quality control over the private programs on which public funds are spent. The court of appeals' decision would remove this control, and, with it, the ability of States and local school districts to ensure that the programs they fund are high quality, cost-effective and accountable.

State and local governments have an obligation to expend money from the public fisc in a responsible, accountable, cost-effective manner, and they are entitled to set educational standards which will enable them to fulfill that obligation. *See In re Conklin*, 946 F.2d 306, 311 n.5 (4th Cir. 1991) ("A state properly has a legal right to impose certain requirements and conditions on a special education facility before the state can be forced to pay for the education of a handicapped child there."). If state and local governments are stripped of this measure of control over the private special education programs which they must fund under the *Burlington* doctrine, their capacity to ensure that money is spent appropriately will be compromised as public money is diverted to uses over which they have no control.

Moreover, since educational standards reflect expert judgments as to the best methods of providing education, they channel state and local funds to their most cost-effective uses. When those standards are disregarded in ordering reimbursement, public money flows to schools which may use less cost-effective educational practices. For example, States have made the judgment that teachers certified in accordance with state standards are more likely to provide a high quality education; hence, paying the salary of a certified teacher is viewed as a more cost-effective use of public money than paying the salary of

an uncertified teacher. Ordering reimbursement to a school which employs uncertified teachers may, therefore, force public school districts to make payments which do not produce corresponding levels of educational benefit.

Such costly and inefficient reimbursements can deplete public funds in a manner vastly disproportionate to the expenditures made on behalf of other students,[28] leaving less money to be put to the uses which the state educational agency deems more effective. Moreover, allowing such reimbursements gives private schools little incentive to achieve the quality standards set by the State.

If reimbursements such as the one at issue here are permitted, the private schools which fail to provide an appropriate education to children with disabilities, and parents such as the Carters who choose to place their children there, will reap a windfall at the expense of other taxpayers, citizens, and children. Meanwhile, disabled children placed in such schools will not receive the one thing Congress intended to guarantee them—a "free appropriate public education."

---

[28] The educational programs for which parents seek reimbursement under the IDEA can be very expensive indeed. *See, e.g., Drew P. v. Clarke County School District*, 877 F.2d 927 (11th Cir. 1989) (partial reimbursement ordered for placement in Tokyo), *cert. denied*, 494 U.S. 1046 (1990); *Matta v. Bd. of Educ.*, 731 F. Supp. 253, 259 (S.D. Ohio 1990) (in denying reimbursement claim for placement in Japan, noting that "funding for one student in such a program could act to the detriment of many other students, both handicapped and nonhandicapped").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA •
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol St., N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
• *Counsel of Record for the Amici Curiae*

April 29, 1993

No. 91-1523

Supreme Court, U.S.
FILED
APR 29 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, *et al.*,
Petitioners,

v.

SHANNON CARTER, By And Through Her Father And Next Friend, EMORY CARTER,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF OF THE STATES OF ARIZONA, GEORGIA, LOUISIANA, MAINE, MARYLAND, MONTANA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
JOANN GOEDERT
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

Attorneys for Amicus Curiae
State of Maryland

*Counsel of Record

[Additional Counsel listed on inside cover]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

GRANT WOODS
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85507

MICHAEL J. BOWERS
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

RICHARD IEYOUB
Attorney General of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804-9005

MICHAEL E. CARPENTER
Attorney General of Maine
State House Station #6
Augusta, Maine 04333

JOSEPH P. MAZUREK
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401

ROBERT J. DEL TUFO
Attorney General of New Jersey
Justice Complex
CN080
Trenton, New Jersey 08625

TOM UDALL
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1508

MICHAEL F. EASLEY
Attorney General of North Carolina
P.O. Box 629
Raleigh, North Carolina 27602

HEIDI HEITKAMP
Attorney General of North Dakota
600 East Boulevard Avenue
Bismark, North Dakota 58506

THEODORE R. KULONGOSKI
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310

T. TRAVIS MEDLOCK
Attorney General of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

MARK BARNETT
Attorney General of South Dakota
State Capitol Building
500 East Capitol Avenue
Pierre, South Dakota 57501

CHARLES BURSON
Attorney General of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37243-0485

R. PAUL VAN DAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114

STEPHEN D. ROSENTHAL
Attorney General of Virginia
101 North Eighth Street
Richmond, Virginia 23219

JOSEPH B. MEYER
Attorney General of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002

QUESTION PRESENTED

Whether a learning disabled child's parents are entitled to State reimbursement under the Individuals with Disabilities Education Act ("IDEA") when they unilaterally place her in a private school that does not meet State educational standards or in other respects satisfy the criteria of a "free appropriate public education," which the State is required to provide under 20 U.S.C. §§ 1401(a)(18) and 1412(1) as a condition of receiving federal funding under the Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF AMICI CURIAE AND INTRODUCTORY STATEMENT 2

ARGUMENT 7

I. A STATE EDUCATION AGENCY CANNOT MEET ITS OBLIGATION TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION TO STUDENTS WITH DISABILITIES IF IT CANNOT LIMIT PRIVATE EDUCATION PLACEMENTS TO PROGRAMS WHICH ARE APPROVED BY THE STATE AND OTHERWISE MEET THE STANDARDS OF THE IDEA 7

II. THE DECISION BELOW EXPOSES THE STATES TO SIGNIFICANT MONETARY LIABILITY AND IMPAIRS THEIR ABILITY TO PROVIDE FREE APPROPRIATE PUBLIC EDUCATION AS REQUIRED BY THE IDEA 22

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Battle v. Commonwealth of Pennsylvania, 629 F.2d 269 (3d Cir. 1980), cert. denied, Scanlon v. Battle, 452 U.S. 968 (1981) 15

Board of Education v. Rowley, 458 U.S. 176 (1982) 13,14,18,22

Conklin v. Anne Arundel County Board of Education, 946 F.2d 306 (4th Cir. 1987) 21

Honig v. Doe, 484 U.S. 305 (1988) 15,18

Schimmel ex rel. Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987) 21

School Committee of the Town Burlington v. Department of Education, 471 U.S. 359 (1985) 9,11

Tucker v. Bay Shore Union Free School District, 873 F.2d 563 (2d Cir. 1989) 21

Statutes, Regulations and Rules

20 U.S.C. § 1400(c) 8,11,23
20 U.S.C. § 1401(a)(18) i,8
20 U.S.C. § 1401(a)(18)(B) 11
20 U.S.C. § 1411(a)(1)(B)(v) 28
20 U.S.C. § 1412(1) i,3,11
20 U.S.C. § 1412(5)(G) 18
20 U.S.C. § 1413 13
20 U.S.C. § 1413(a)(2) 11
20 U.S.C. § 1413(a)(4)(B) 3
20 U.S.C. § 1413(a)(4)(B)(ii) 12
20 U.S.C. § 1415 20
20 U.S.C. § 1415(e)(2) 14

Md. Educ. Code Ann. § 8-403(c) 17
Md. Educ. Code Ann. § 8-409(a) 17

North Carolina Procedures Governing
Programs and Services for Children
with Special Needs § 1527 17

34 C.F.R. § 300.153(a)(1)(ii) 16
34 C.F.R. § 300.153(b)(2) 16

Code of Maryland Regulations
§ 13A.05.01.11 17
§ 13A.05.01.11(d) 17
§ 13A.09.09 17

Sup. Ct. R. 37 2

Miscellaneous

S. Rep. No. 94-168, P.L. 94-142,
94th Cong., 1st Sess., reprinted in
1975 U.S. Cong. & Admin. News 27

S. Conf. Rep. No. 94-455, P.L.
94-142, 94th Cong., 1st Sess.,
reprinted in 1975 U.S. Code Cong.
& Admin. News 28

14th Annual Report to Congress
on the Implementation of the
Individuals with Disabilities Act:
To Assure the Free Appropriate
Public Education of All Children
with Disabilities (United States
Department of Education, 1992) 25-26,29

No. 91-1523

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, et al.,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE STATES OF ARIZONA, GEORGIA, LOUISIANA, MAINE, MARYLAND, MONTANA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as amici curiae in support of Petitioners.

INTEREST OF AMICI CURIAE AND INTRODUCTORY STATEMENT

This case involves the States' ability to regulate the provision of publicly funded special education services in private schools. The Fourth Circuit's decision severely restricts that ability and impairs the States' capacity to meet their obligations under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 et seq., and has serious adverse consequences for both the quality and cost of special education services. Those consequences will be especially burdensome in today's harsh economic environment in which special education costs have exploded at the same time that the

federal government's share of these costs has steadily shrunk.

Each State that receives federal funding under the IDEA is responsible for assuring "all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(1). This obligation extends to students educated in private as well as public schools, and in most States takes the form of both significant regulatory responsibility and substantial financial obligation. See id. § 1413(a)(4)(B).

The issue in this case is whether State or local education agencies must reimburse parents who unilaterally place children with disabilities in private schools that do not meet the States' special education standards. The Fourth Circuit held that when a local school system has not provided an appropriate education

to a student with disabilities, the student's parents may place that student in a private school and obtain reimbursement from the State, even though the private school failed to meet fundamental educational requirements imposed by the IDEA. This Court should reverse the decision below and hold that the IDEA does not require public reimbursement to schools that do not satisfy the IDEA's most rudimentary standards.

In finding that the private placement in this case was reimbursable, the Fourth Circuit disregarded the IDEA's central purpose in seeking to provide a "free appropriate public education" to all children covered by that Act, and simultaneously exposed public agencies to financial liability for costly unilateral private school placements that fall far short of the IDEA's standards. The IDEA imposes upon the States the weighty obligation to ensure

that all students with disabilities receive an appropriate education, and sets elaborate standards for appropriateness. The decision below makes it substantially more difficult for States, local school systems and private schools approved by the States to fulfill those standards, while removing many private institutions -- and students -- from the IDEA's reach.

The Fourth Circuit dismissed these concerns with the assurance that similar cases would be so rare as to have trivial systemic impact on the education of students with disabilities. In the year that has passed since the Fourth Circuit decided this case, however, the experiences of States in the Fourth Circuit suggest that the decision below has had and will continue to have a substantial adverse affect on special education services. Increasing numbers of cases have been filed within those States by

parents seeking reimbursement for private placements in schools that do not meet State special education standards and requirements. These private placements, which may cost between $50,000 - $100,000 per student annually, represent the most expensive component of a State's special education budget and needlessly drain substantial financial resources from necessary and appropriate special education programs.

Reimbursing inappropriate private placements with public funds also removes the incentive for private schools to cooperate with the States' efforts to ensure IDEA compliance and meet important but costly special education standards. Reversal is warranted, therefore, to halt the serious erosion that the decision below has caused in the States' ability to enforce adherence with IDEA standards as a condition of reimbursement.

Unless this Court reverses that decision, State education agencies will be severely hampered in their efforts to serve students with disabilities in accordance with the IDEA's mandates.

ARGUMENT

I. A STATE EDUCATION AGENCY CANNOT MEET ITS OBLIGATION TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION TO STUDENTS WITH DISABILITIES IF IT CANNOT LIMIT PRIVATE EDUCATION PLACEMENTS TO PROGRAMS WHICH ARE APPROVED BY THE STATE AND OTHERWISE MEET THE STANDARDS OF THE IDEA.

In holding that private schools accepting unilateral placements need not meet "the whole panoply of duties" imposed by the IDEA (App. at 16a), the Fourth Circuit has fashioned a rule that allows these schools to evade the IDEA's critical educational requirements and still

obtain public reimbursement. That decision is wrong because Congress never intended the IDEA to compel public agencies to pay for educational programs that fail to comply with the IDEA's essential statutory duties.

The plain language of the IDEA requires State education agencies ("SEAs") to scrutinize carefully non-public programs that serve students with disabilities and to ensure that such programs meet the same standards as public school special education programs. The IDEA mandates that all children with disabilities "have available to them . . . a free appropriate public education." 20 U.S.C. § 1400(c). 20 U.S.C. § 1401(a)(18) defines "free appropriate public education" as special education and related services that:

> (A) have been provided at public expense, under public supervision and direction, and without charge,

> (B) meet the standards of the State educational agency, . . . [and]
>
> (D) are provided in conformity with the individualized education program. . . .

(Emphasis added).

The IDEA fulfills its central purpose of providing disabled children with "both an appropriate education and a free one," School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359, 372 (1985), by unambiguously mandating that the SEAs bear standard-setting and monitoring responsibility over all special education programs. Conversely, the IDEA does not exempt private, unilateral placements from the obligation to provide free appropriate public education, or the SEAs from ensuring that private schools meet that obligation. Many SEAs thus operate private school

accreditation systems to regulate non-public school placements for conformance with the IDEA.

Notwithstanding the substantial requirements that the IDEA imposes to ensure an appropriate education, the Fourth Circuit expressly acknowledged that the private school in this case did "not attempt to comply with the terms of the Act." (App. at 11a.) Indeed, any compliance attempt would have been unsuccessful, as the court noted that (1) the school did not develop Individualized Education Plans ("IEPs") for special education students, and (2) the school employed teachers -- one of whom taught respondent Shannon Carter -- who failed to meet federal standards for special education personnel, and (3) these teachers "were not certified by the state" and so "[u]nder state law . . . are prohibited from teaching in a South Carolina public

school." (App. at 11a-12a) (emphasis added). State reimbursement is simply inappropriate in light of these profound deficiencies in this private school placement.

This Court has stated that a federal court has the power under the IDEA "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." Burlington, 471 U.S. at 369 (emphases added). A placement is proper under the IDEA if -- and only if -- it provides the equivalent of a free appropriate public education, see, e.g., 20 U.S.C. §§ 1400(c); 1412(l); 1413(a)(2), which the IDEA expressly defines is an education provided by a program that "meet[s] the standards of the State educational agency . . . ." Id. § 1401(a)(18)(B).

The Fourth Circuit's analysis passed over these fundamental principles by ignoring the statutory definition of free appropriate public education, and instead focusing solely on an IDEA provision that directs the States to ensure that private schools to which public agencies refer students "meet standards that apply to State and local educational agencies . . . ." Id. § 1413(a)(4)(B)(ii). The court reasoned that this provision applies only to private placements made by public agencies and not to unilateral placements by parents, and that the student's private school program did not have to meet State standards because "[t]he Act itself simply imposes no requirement that the private school be approved by the state in parent-placement reimbursement cases." (App. at 13a.)

Neither the IDEA, including the narrow provision

above that the Fourth Circuit cited, nor any of this Court's decisions support the Fourth Circuit's holding that unilateral private school placements are entitled to State reimbursement merely by providing an education "reasonably calculated to enable the child to receive educational benefits." (App. at 17a), quoting Board of Education v. Rowley, 458 U.S. 176, 207 (1982).[1] To the contrary, this Court has stated that a reviewing court must make a more complete inquiry in determining whether reimbursement is appropriate under the IDEA:

---

[1] 20 U.S.C. § 1413, which is entitled "State plans," sets forth the elements that must be contained in each State plan for special education. That provision provides that the State plan must include policies and procedures that assure that when public agencies place students in private schools to carry out the requirements of the IDEA, those schools must meet standards of appropriateness. That section does not require, however, that State plans make any provisions for reimbursement of the costs of unilateral private school placements that parents make outside of the process that the IDEA prescribes.

> [A] court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Board of Education v. Rowley, 458 U.S. at 206-07 (footnotes omitted).

This Court in Rowley recognized "the importance Congress attached to [the IDEA's] procedural safeguards," and observed that "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation . . . as it did upon the measurement of the resulting IEP against a substantive standard." 458 U.S. at 205-06. IEPs serve as "the vehicle for giving content to the required 'free appropriate public education,'"

Battle v. Commonwealth of Pennsylvania, 629 F.2d 269, 272-73 (3d Cir. 1980), cert. denied, Scanlon v. Battle, 452 U.S. 968 (1981), and constitute "the centerpiece of the statute's education delivery system for disabled children." Honig v. Doe, 484 U.S. 305, 311 (1988). Unless an educational program is based upon an IEP, therefore, it is not "appropriate" under the IDEA, and a State cannot use its special education resources to pay for services provided by such a program.

The IDEA similarly does not sanction State reimbursement for services provided by uncertified teachers. The IDEA makes the States responsible for the staff qualifications in private schools, as federal regulations explicitly command that the States set suitable qualifications for personnel providing the IDEA's services to students "served by State, local and

private agencies." 34 C.F.R. § 300.153(a)(1)(ii) (emphasis added). These requirements, at the entry level, must be

> consistent with any State approved or recognized certification, licensing, or other comparable requirements that apply to the profession or discipline in which a person is providing special education or related services.

Id. § 300.153(b)(2).

To ensure that these and other key IDEA requirements are met by all programs serving students with disabilities, the States have implemented private school approval programs that oversee compliance by public and private agencies with the IDEA's core mandate of individualized education and its clear regulatory personnel standards.[2] In addition, the SEAs

[2] For example, Maryland law expressly provides that "a (continued...)

carefully scrutinize programs to determine that they meet the IDEA's other important standards, such as education in the least restrictive environment, see 20

[2](...continued)
child who needs special education services that are not provided in a public county, regional, or State program shall be placed in an appropriate nonpublic educational program that offers these services." Md. Educ. Code Ann. § 8-409(a). That law directs the State Board of Education to develop regulatory standards for accreditation of non-public programs, and mandates that the standards for non-public entities serving students with disabilities "may not be lower than the standards for the education of children who are enrolled in programs that are operated by a county board." Md. Educ. Code Ann. § 8-403(c).

Accordingly, the Maryland State Board of Education has promulgated regulations to govern the accreditation of non-public special educational programs so that they meet the IDEA's requirements. To gain such approval, the program must meet explicit standards which set forth the minimal criteria for special education services embodied in the IDEA and demanded of public school systems in this State. See Code of Maryland Regulations §§ 13A.09.09; 13A.05.01.11. In addition, the non-public institution must have written policies and procedures ensuring that IEPs are developed for each student with disabilities. Id. § 13A.05.01.11(d). Similar regulatory programs exist in other States. See, e.g., North Carolina Procedures Governing Programs and Services for Children with Special Needs § 1527.

U.S.C. § 1412(5)(G); Rowley, 458 U.S. at 202-03, parental involvement, including access to due process proceedings; see 20 U.S.C. § 1415; Rowley, 458 U.S. at 205-06; and appropriate student discipline policies. See Honig v. Doe, 484 U.S. 305 (1988).

It is thus contrary to the IDEA's strict regulatory scheme to require State reimbursement in this case where the private school developed no IEP and otherwise failed to meet federal special education personnel standards and South Carolina's teacher certification requirements. The Fourth Circuit perceived some implicit unfairness in imposing these federal and State educational requirements on schools selected by parents who believe their child's public education to be inappropriate and who, "on their own, seek alternative schooling." (App. at 15a.) But parents have many

options and full access to the information needed to place their child in an appropriate school. Indeed, the Fourth Circuit cited South Carolina statutes and regulations governing the placement of children in approved private schools that meet State standards (App. at 13a-14a), implicitly acknowledging, therefore, that the Carters could have obtained assistance from State and local educational agencies in selecting an appropriate private school for their daughter.

Moreover, accreditation and systemic monitoring of private schools exist in many States and operate to provide parents dissatisfied with their child's public placement with a range of private schools from which to choose.[3] In States with small school-age populations,

---

[3] In Maryland, for example, there are more than fifty private schools accredited to provide a full range of special (continued...)

it may also be feasible for an SEA to examine each proposed private school placement individually to determine whether the school meets the IDEA's standards. Similarly, an SEA may elect to delegate a portion of ongoing school monitoring to local school systems where requests for placement arise.

Therefore, notwithstanding the Fourth Circuit's concern for the choice faced by parents who believe that their child's public education is inappropriate, it is not unreasonable to expect parents who demand that the public pay for a costly private school placement to inquire into whether that placement is appropriate. Such an inquiry into whether a private school meets minimum

---

[3](...continued)
education services, and the SEA publishes a list of those programs. That list is publicly available from both the SEA and each local school system in the State.

State standards would seem an essential component in any parental effort to identify a special education program for a child with disabilities.[4]

Here, as the Fourth Circuit found, "approval of Shannon's placement at Trident had never been sought from the State Department of Education." (App. at 5a.) In light of that, and that the school's special education services fell far short of the IDEA's and South Carolina's standards, and that the parents in this case

---

[4] Ironically, prior to its decision in this case, the Fourth Circuit repeatedly held that State approval was a condition precedent to public reimbursement for unilateral private school placements. See Conklin v. Anne Arundel County Board of Education, 946 F.2d 306, 311 n.5 (4th Cir. 1991) ("A state properly has a legal right to impose certain requirements and conditions on a special education facility before the state can be forced to pay for the education of a handicapped child there."); Schimmel ex rel. Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987) (holding that the State of Virginia was not financially responsible for the parents' placement of their child in an unapproved out-of-state facility). Accord Tucker v. Bay Shore Union Free School District, 873 F.2d 563 (2d Cir. 1989).

presented no proof that they expended any effort toward placing her in a private school that met State requirements, the public should not be required to bear the costs of that placement.

II. THE DECISION BELOW EXPOSES THE STATES TO SIGNIFICANT MONETARY LIABILITY AND IMPAIRS THEIR ABILITY TO PROVIDE FREE APPROPRIATE PUBLIC EDUCATION AS REQUIRED BY THE IDEA.

The decision below underscores this Court's admonition that "courts must be careful to avoid imposing their view of preferable educational methods upon the States." Rowley, 458 U.S. at 207. The court's decision in this case means that a school system which, at worst, may have merely underestimated a student's academic goals in the context of an effective IEP must now pay for placement in a private school that

does not meet the IDEA's requirements for individualized education.[5] That finding significantly broadens the States' duty by creating liability for placements in private programs that do not meet the IDEA's most basic standards, and seriously impedes the States' ability to ensure the provision to all children of an appropriate education under the IDEA.

20 U.S.C. § 1400(c) identifies four goals that the IDEA strives to achieve: (1) "to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special

---

[5] This Court granted certiorari only on the first question presented in Florence County's petition and thus is not reviewing the propriety of the Fourth Circuit's decision that the public placement in this case did not provide a free appropriate public education under the IDEA. That decision is incorrect, however, for the reasons stated in Florence County's petition and the States' amici brief supporting that petition.

education and related services designed to meet their unique needs;" (2) "to assure that the rights of children with disabilities and their parents or guardians are protected;" (3) "to assist States and localities to provide for the education of all children with disabilities;" and (4) "to assess and assure the effectiveness of efforts to educate children with disabilities." To fulfill that broad mission, Congress imposed virtually all of the IDEA's obligations on State and local education agencies, with the expectation that the federal government would provide substantial financial assistance.

But in the nearly two decades since the IDEA's passage, the burdens on the State and local education agencies have increased at a dramatic rate while the federal financial contribution has diminished steadily. The Fourth Circuit's decision in this case creates a

severe hardship for State and local agencies already struggling to meet the IDEA's growing mandate. By expanding upon one of the IDEA's goals -- parental procedural safeguards -- the Fourth Circuit has impaired, in both financial and programmatic ways, the public agencies' ability to meet the IDEA's primary purpose of assuring a free appropriate public education to all students with disabilities.

Since the IDEA was enacted, the number of students receiving special education services has increased by more than a third. In 1976-77, 3,485,088 students were served under the IDEA. That number has increased on average by more than 2% per year and in 1990-91 had grown to 4,817,503. See 14th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act: To Assure the Free

Appropriate Public Education of All Children with Disabilities (United States Department of Education, 1992) ("14th Annual Report to Congress"), at 3. The percentage of special education students as a percentage of the total school population has increased similarly from 4.8% in 1976-77 to 7.1% in 1990-91. Id.[6]

While the number of students with disabilities has climbed steadily, special education costs have escalated at an even more explosive rate. In Fiscal Year 1991, for example, Maryland spent $571,925,633 to educate students with disabilities, which was over $80,000,000

[6] The growth in the numbers of students with disabilities has numerous causes: the addition of new categories of disabilities and covered services in amendments to the 1975 act; program enhancements by education agencies; increases in the number of children with learning and behavioral disabilities arising from pre-natal exposure to alcohol and drugs; and, recently, increasing referrals of disruptive or other "difficult to teach" students to the special education system. Id. at 3-5.

more than the Fiscal Year 1989 total of $489,932,292 and more than double the cost of $211,833,657 in Fiscal Year 1981. See Financial Reports of the Program and Finance Unit, Maryland State Department of Education ("MSDE Financial Reports").

Further, as special education costs have mounted dramatically, the federal share of those costs has dropped, contrary to Congress' original intentions. In developing the federal funding formula in 1975, the Senate anticipated that, initially, the federal share should comprise 25% of the costs of providing special education services that exceeded the average amount spent for non-disabled students, see S. Rep. No. 94-168, P.L. 94-142, 94th Cong., Ist Sess., reprinted in 1975 U.S. Cong. & Admin. News, p. 1439, while Congress anticipated that by 1982, the federal share of the

education of each student with disabilities could increase to 40% of the average national per-pupil cost for all public students. See 20 U.S.C. § 1411(a)(1)(B)(v); see also S. Conf. Rep. No. 94-455, P.L. 94-142, 94th Cong., lst Sess., reprinted in 1975 U.S. Code Cong. & Admin. News, p. 1487.[7]

In practice, however, federal assistance for special education has not approached those proportions, and instead in recent years has declined constantly as a percentage of total special education expenditures. Federal assistance accounted for only 7.9% of special education costs nationally in 1987-88, for example, see

[7] The Senate report calculated that it would cost approximately twice as much to educate a student with disabilities as it would to teach non-disabled students. See S. Rep. No. 94-168, P.L. 94-142, 94th Cong., lst Sess., reprinted in 1975 U.S. Code Cong. & Admin. News, p. 1439. The percentage figures cited above are based on that assumption.

14th Annual Report to Congress, at xxiii, which is well below what Congress projected a decade earlier. Similarly, in Maryland in Fiscal Year 1991, the federal contribution had dropped to 5.9% of the total cost of special education, down from 10.4% in Fiscal Year 1981. See MSDE Financial Reports.[8]

Other States similarly have been plagued with spiraling special education costs and a decreasing federal contribution toward those costs. Local education agencies in North Carolina, for example, reported that $184 million were spent on special education and related services in the 1985-86 school year, and that $326

[8] The 5.9% figure represents the federal share of total expenditures in Maryland for the education of students with disabilities. If only the "excess cost" of educating those students is calculated (i.e., the average cost of providing special education to a student that exceeds the cost of educating a non-disabled student), the federal share is 7.9%.

million were spent on those same services in the 1990-91 school year. See Financial Reports of the North Carolina Department of Public Instruction, Division of Exceptional Children's Services. The federal government's share of those expenditures, however, rose from $34 million in the 1985-86 school year to only $42 million in the 1990-91 school year. Thus, the federal government's percentage share of these costs decreased from approximately 19% to 13% in that period.

Nowhere has the growing State and local special education burden been more onerous than in the area of private school placements, which constitute the most expensive element in the range of special education services. Indeed, in Fiscal Year 1992, Maryland's total expenditure for private school special education placements was $63,426,735 for 2,016 students, which

far exceeded the entire federal IDEA contribution to the State of $35,777,375. See MSDE Financial Reports. Moreover, of those Maryland expenditures, the total costs of residential private school placements alone more than tripled from $9,180,422 in 1985 -- the year this Court decided Burlington -- to $33,547,680 in 1992, while the average residential placement cost per pupil in that same period more than doubled from $25,015 in 1985 to $51,374 in 1992. See MSDE Financial Reports.

These rapidly increasing high average annual costs illustrate precisely why even a few private placements that are now reimbursable under the decision below can seriously obstruct the States' ability to meet their obligations to disabled and non-disabled students alike. For example, during the recessionary 1992 school year,

the average cost in Maryland of a private residential placement ($51,374) exceeded the approximate cost to educate more than eight students ($5,815 average expenditure per student), see Maryland School Performance Report 1992 (Maryland State Department of Education, 1992), p.11, as well as the estimated cost to purchase the equivalent services of 1.3 full-time teachers in the State ($39,054 average teacher's salary). See "Professional Salary Schedules: Maryland Public Schools 1992-93" (Maryland State Department of Education, 1993). Given these high per-placement costs and the sudden, unpredictable nature of a finding of liability, therefore, a single placement that is now reimbursable under the Fourth Circuit's decision can force real reductions in services for other students, especially in small school districts.

The Fourth Circuit's decision imposes other additional costs that adversely affect the ability of State and local education agencies to provide a free appropriate public education. Public agencies often are able to negotiate with private schools reasonable tuition charges and other fees when approving those schools. However, because of the decision below, private schools no longer have the same incentive to seek State approval, and no such cost controls apply to schools accepting unilateral placements that fail to seek that approval. Thus, the cost of education services in an unapproved program may be far more than the cost that public agencies pay for the same services in an approved school.

Fiscally strapped public education agencies face these impediments at the same time they confront the greatest

demand ever for special education resources. The Fourth Circuit nevertheless dismissed the seriousness of this problem with the observation that "parents who unilaterally place their child in an unapproved private school bear substantial risks -- risks that function to ensure that our decision will not be a means through which parents can subvert the Act's emphasis on public education." (App. at 18a.) Unfortunately, this assessment appears to be inaccurate, as there are already early signs of the systemic harm that the decision below has caused with respect to the public agencies' ability to ensure free appropriate public education.[9]

---

[9] In Maryland, where approximately 20-30 State administrative hearings are held each year for all reasons pursuant to the IDEA's due process requirements imposed by 20 U.S.C. § 1415, 8 of the 26 cases heard in 1992 invoked the decision below to demand reimbursement for unilateral private school placements. The parents prevailed in four of (continued...)

Most fundamentally, the Fourth Circuit's decision threatens the States' ability to ensure that private placements, even at currently approved schools, will continue to meet the IDEA's requirements. In eliminating any State capacity to ensure a free appropriate public education at schools that accept unilateral placements, the Fourth Circuit has substantially diluted the financial incentive that motivates private schools to comply with the IDEA's exacting standards and seek State approval. Because private schools can now obtain public reimbursement for some special education placements regardless of their IDEA compliance, fewer schools will undertake difficult and

---

[9](...continued)
those administrative decisions under the Carter standard, while the parents in the remaining four cases have appealed to federal district court.

costly efforts to meet State and federal special education standards. Public agencies will thus find themselves with a smaller range of private school programs in which to place students who truly need intensive non-public services, and will be less able to regulate private school providers as a whole for IDEA compliance.[10]

State and local education agencies already bear a heavy and growing financial burden in their efforts to meet IDEA requirements, as they confront more students than ever before in need of special education services, soaring costs, and a federal contribution that is

---

[10] It is ironic that at the same time that it diminished the financial incentive that private schools have to comply with the IDEA's standards, the Fourth Circuit emphasized the principle that public agencies can place students only in programs that meet those standards. See App. at 13a (stating that "private schools receiving funds under the Act [must] meet state educational standards . . . only when the child is placed in the private school by the state or local school system.").

far less than Congress contemplated and that shrinks each year as a portion of total special education costs. The Fourth Circuit's decision exacerbates this increasingly critical situation in public education by imposing new fiscal obligations and weakening the States' ability to ensure that non-public facilities meet State and federal standards for students with disabilities.

That result directly contravenes Congress' manifest intent that the States vigorously assure that all students with disabilities receive a free appropriate public education, and that federal special education funds should be spent for that purpose alone. This Court should reverse the decision below, therefore, and hold that Congress did not intend increasingly scarce special education resources to be used to pay for costly services that do not meet the IDEA's well-established standards.

CONCLUSION

For the reasons stated, this Court should reverse the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
JOANN GOEDERT
Assistant Attorneys General
200 St. Paul Place
20th Floor
Baltimore, Maryland 21202
(410) 576-6318

Attorneys for Amicus Curiae
State of Maryland

*Counsel of Record